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SOLICITORS' JOURNAL

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CURRENT TOPICS

Excessive Charges

WE are grateful to the Council of The Law Society for publishing at length in this month's *Gazette* a detailed review of the recent case in which the Disciplinary Committee imposed a penalty of £500 upon a solicitor on the grounds that he had been guilty of conduct unbefitting a solicitor in charging certain clients with grossly excessive fees in connection with their defences in criminal cases. The operative word is "grossly." It has always been accepted that solicitors are and ought to be entitled to make their own terms with their clients in criminal cases without reference to any scale. In reaching their decision in this case, the Disciplinary Committee made it abundantly clear that they must not be taken as expressing the view that in every case where a solicitor agrees with a client a fee which is substantially larger than the fee which would be allowed on taxation he would be guilty of conduct unbefitting a solicitor. From this case it seems clear that the safest course for a solicitor to follow, in agreeing a fee with a client, is for him to distinguish clearly his own fee from anticipated or actual disbursements, such as, in particular, counsel's fees.

Habeas Corpus Peripatetic Obsolete

THE peripeteia which has befallen the once firmly held belief that an applicant for a writ of *habeas corpus* was entitled to apply in turn to every judge of the High Court may aptly be described as the modern Battle of Hastings. The rot of one of the glorious traditions of the English judicial system started last November when the Queen's Bench Divisional Court ruled that such an applicant in a criminal cause, who has been heard once by a Divisional Court, cannot be heard again by another Divisional Court of the same Division on a renewed application made on the same evidence and the same grounds (*Re Hastings* (No. 2) [1958] 3 W.L.R. 768). Now the Chancery Divisional Court, after some Gilbertian diversions involving the retirement from and rapid return to the Bench of one of the two presiding judges, has made it plain that in such circumstances there is no right to apply to any other Division of the High Court. The relevant passage in HARMAN, J.'s judgment is a model of clarity. The application for *habeas corpus* was precluded by the absence of the imaginary right to go round and round from judge to judge when the term was in progress. There had never been such a thing and there was not now; and having had the judgment of the High Court, this applicant could not have another one (*Re Hastings, The Times*, 6th and 7th March, 1959). To many lawyers it will come as a shock that one of their favourite illustrations, used when explaining

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the English judicial system and its quirks to guests from overseas, has not had a sound foundation in law since 1873, when the former separate courts of law and equity were replaced by the Supreme Court of Judicature with the High Court of Justice as its court of original jurisdiction.

Street Offences Bill

VIRTUALLY everyone is now convinced that prior cautions are essential before any woman is convicted of soliciting. The only question is whether the cautions should be statutory or administrative. We have inclined to the view that, where in practice some condition must be fulfilled before anyone is convicted of a crime, that condition should be written into the statute. We are, however, impressed by the objections which the ATTORNEY-GENERAL made to Miss VICKERS' amendment in the Standing Committee last week. The amendment was designed to secure that a person found soliciting should be taken by a constable before a magistrate and formally cautioned and that no one should be convicted unless she had received two cautions or had been convicted within the previous two years. The Attorney-General said that it would be without precedent to give power to arrest for conduct which did not of itself constitute an offence, and that if the caution were to be judicial there ought to be some right of appeal. On the whole, we think that to leave the cautions to the police is the only practicable course, although we are not happy about it.

Recommendations on Hallmarking

IN December, 1955, the Departmental Committee on Hallmarking under the chairmanship of Sir LEONARD STONE, O.B.E., Vice-Chancellor of the County Palatine of the Duchy of Lancaster, was appointed "to examine the state of the law on the assaying and hallmarking of precious metals, including the passing off of base metals as precious metals, and to recommend what revision of the law is desirable in the light of present-day conditions." The Committee's Report, submitted to the PRESIDENT OF THE BOARD OF TRADE last September, was published on 3rd March (Cmnd. 663, H.M.S.O., 7s.). The main recommendation is that the hallmarking system, regarded as fundamentally sound, should be retained, but brought up to date, modified and simplified. One comprehensive statute should replace the many Acts dealing with hallmarking. The system should be extended to cover articles made of platinum the standard for which should represent 950 precious metal content-parts per 1,000 as against 925 for Sterling silver, 916 for 22 carats gold, 750 for 18 carats gold, 585 for 14 carats gold and 375 for 9 carats gold. This last standard was considered too low, but as it had existed for over a century it would cause too much dislocation in the trade to abolish it. A reduction in the number of assay offices from six to four is recommended. The companies controlling the assay offices should continue to be responsible for the law enforcement and prosecution of offenders, but in the future the Board of Trade should share this responsibility. The companies should be entitled to strike through or obliterate marks which are false or misleading in addition to being empowered, as at present, to batter sub-standard articles submitted for assay. This last power should only be retained in respect of articles made after the appointed day.

Marriage of Infants: Consent

As is well known, s. 3 of the Marriage Act, 1949, requires that where a person under the age of twenty-one, not being a widower or a widow, wishes to be married, the consent of the person or persons specified in the Second Schedule to that Act must first be obtained. However, "if any person whose consent is required refuses his consent, the court may, on application being made, consent to the marriage, and the consent of the court so given shall have the same effect as if it had been given by the person whose consent is refused" (s. 3 (1) (*b*)). "The court" in this connection may be the High Court, the county court or (and this seems to be the usual venue) the magistrates' court, presumably the court for the district in which the person refusing consent resides (see *R.* v. *Sandbach Justices; ex parte Smith* [1950] 2 All E.R. 781). We were interested to read of a recent case at Fareham, Hampshire, where the court was asked to give its consent to the wedding of a young lady who would be twenty-one in July of this year. The ground of the application was reported to be to enable the parties "to collect the income tax rebate" and this prompted us to see if there was any restriction on the exercise of the court's discretion in applications of this kind. Apparently there is not and, at least in the case of applications for consent made to a court of summary jurisdiction and, probably, to a county court, there is no appeal against the court's decision. This is established by *Queskey* v. *Queskey* [1946] 1 Ch. 250 where VAISEY, J., held that in applications under s. 9 of the Guardianship of Infants Act, 1925, to obtain the consent of the court to the marriage of an infant, whose parents had refused consent, the decision of the justices was final and there was no right of appeal.

Infant Co-respondents

IN the course of a case which was heard recently in Manchester, Special Commissioner Judge F. R. BATT found that a guardian *ad litem* should be appointed to act for an infant co-respondent although he admitted that those who were not lawyers might think it strange that a person of an age "to indulge in matrimonial frolics" should need a guardian to safeguard his interests. The position is now governed by r. 66 of the Matrimonial Causes Rules, 1957. Rule 66 (1) provides that an infant may, *inter alia*, defend or intervene in a matrimonial cause by his guardian *ad litem*, and r. 66 (4) stipulates that, where a petition, answer or originating summons has been served on an infant and no appearance has been entered on his behalf, the party at whose instance the petition, answer or originating summons was served shall, before proceeding further with the cause, apply for an order that some person be assigned guardian of the infant by whom he may appear and defend or intervene in the proceedings. This procedure was followed in *Alderman* v. *Alderman and Dunn* [1958] 1 W.L.R. 177, and it is difficult to see how a case such as *Brockelbank* v. *Brockelbank and Borlase* (1911), 27 T.L.R. 569, where it was decided that the fact that the co-respondent was an infant and had not appeared was no reason for not making an order for costs against him, could now arise! Although the learned Special Commissioner postponed making a finding of the commission of adultery by the infant co-respondent with the wife (an adjournment was granted to ascertain the infant's exact age), he saw no reason why a decree *nisi* should not be granted to the husband at that stage of the proceedings.

THE RESTRICTIVE PRACTICES COURT AT WORK

In previous articles in this Journal* an attempt was made to outline the provisions of the Restrictive Trade Practices Act, 1956, to envisage the kind of problems that the Restrictive Practices Court would be called upon to deal with, and to sketch the procedure which it would adopt. Now that the court has been functioning actively for several months, and has given judgment in two of the cases referred to it, it is timely to review its work so far.

Practice and procedure

Two important points of practice and procedure have been dealt with by the court. In *Re Chemists' Federation Agreement (No. 1)* (1958), L.R. 1 R.P. 43, the court made it clear that the Registrar of Restrictive Trading Agreements and the respondents to a reference of a restrictive trading agreement to the court should, so far as possible, agree to the presentation of their evidence in the form of written statements, copies of which would be exchanged before the trial, and that witnesses should be called only when it was desired to cross-examine them. The court has power to order that testimony shall be given in this way (Restrictive Practices Court Rules, 1957, rr. 36 (*g*) and 55), and it is desirable that the court should encourage the practice because, as the hearings in the two cases already decided by the court have shown, the volume of evidence to be submitted to the court will always be considerable and will often be repetitive, and little is to be gained by a formal examination-in-chief of most of the witnesses.

The other point of procedure arose in *Re Chemists' Federation Agreement (No. 2)* (1958), L.R. 1 R.P. 75. In that case a number of witnesses were called to testify as to the practical effect of the restrictions in the Chemists' Federation Agreement on the branches of trade in which they were engaged, and it was submitted on behalf of the Registrar that they could also testify as to the beneficial or adverse effects of the restrictions on their branches of trade and on the public generally. The court ruled that their testimony was inadmissible for this purpose. They could not be treated as expert witnesses qualified to interpret the facts stated in their evidence, and in any case, the decision whether the restrictions were contrary to the public interest was for the court to take, so that no pronouncement by any witness on this question could possibly be admissible. The court's ruling will undoubtedly segregate more sharply the witnesses called to testify as to concrete facts from expert witnesses (among whom economists will predominate) who alone will be permitted to express opinions on the facts, and even they will be confined to drawing inferences and will not be allowed to express conclusions whether the restrictive agreement before the court is beneficial or not.

Re Chemists' Federation Agreement (No. 2)

The Chemists' Federation is an association of manufacturers of proprietary medicines and of wholesale and retail chemists. By its rules manufacturer members were required to submit their proprietary products to the council of the Federation which approved the products and included them in the C.F. List if they complied with certain standards. Upon approval being given for his product, the manufacturer member was bound to sell it only to wholesaler members of the Federation, to retail chemists registered under the Pharmacy and Poisons Act, 1933 (whether members of the Federation or not), and to hospitals, doctors, dentists and other professional persons who bought the product for use and not for resale. Wholesaler and retailer members of the Federation were correspondingly bound to acquire the approved product only from the manufacturer or a wholesaler member, and to sell the product, in the case of wholesaler members only to retail chemists registered under the 1933 Act or to professional buyers for use, and in the case of retailer members only to the public or to professional buyers for use. The intended effect of these provisions was, of course, to channel the distribution of C.F. List products through wholesaler members of the Federation and professionally qualified retail chemists, and was designed to carry out the Federation's policy that the business of selling pharmaceutical products to the public, which was traditionally that of professionally qualified chemists, should not be invaded by persons primarily engaged in other branches of trade, such as grocers and confectioners. In fact, however, something less than half in volume of proprietary medicines sold to the public were on the C.F. List, and so the retail chemists were only partially protected by the rules of the Federation.

The Federation sought to defend its rules under s. 21 (1) (*a*) and (*b*) of the Restrictive Trade Practices Act, 1956, on the following grounds, namely: (*a*) that the scheme was reasonably necessary to protect the public from injury in connection with the use or consumption of proprietary medicines because of the professional advice which a qualified chemist alone could give to customers in respect of their suitability and the quantities in which they should be used; and (*b*) that the abolition of the scheme would deny the public certain other specific and substantial benefits or advantages, namely, (i) the benefit of the advice mentioned in (*a*); (ii) the guarantee of the soundness of a medicinal product given by its inclusion in the C.F. List; (iii) the fact that without the profits yielded by the sale of C.F. List products many retail chemists would earn insufficient to keep them in business; and (iv) the fact that chemists had better storage facilities to prevent the deterioration of medicines than other tradesmen. The court held against the Federation on all its contentions: contentions (*a*) and (*b*) (i) were rejected because a customer would only receive beneficial advice from a chemist if he asked for it and the symptoms of his complaint were readily apparent, a fairly rare concurrence; contention (*b*) (ii) because the restrictions in the rules were unnecessary to achieve the object of guaranteeing the soundness of approved products; and contentions (*b*) (iii) and (iv) because they were not proved. Consequently, the court was not called upon to carry out the balancing operation under s. 21 (1) of the Act by weighing the specific defences put forward by the Federation against any detriment suffered by the public in consequence of the restrictions.

Certain points of general interest emerge from this case. They are:—

(1) Although the object of the Federation scheme was to protect the livelihood of chemists and not to benefit the public, that did not prevent the Federation from defending the scheme on the ground that it did in fact benefit the public. In other words, a restrictive trading agreement is not to be condemned because of the motives of the parties to it, but only if its effect is detrimental. Of course, it must

* See 100 Sol. J. 178 and 195; 101 Sol. J. 95, 119, 347, 752, 785 and 806.

be remembered that the Act presumes that its effect is detrimental, and the parties to it may only rebut the presumption in one of the seven ways set out in s. 21 (1).

(2) Three of the grounds which the parties to a restrictive trading agreement may plead in its defence are that the agreement is " reasonably necessary " to achieve certain specified objects (s. 21 (1) (*a*), (*c*) and (*d*)). The expression " reasonably necessary " means that the restrictions imposed by the agreement must be such that a reasonable man would enforce them in order to achieve the object in question. The court said :

> " We have to ask ourselves whether a reasonable and prudent man who is concerned to protect the public against injury would enforce this restriction if he could. He would not do so unless he was satisfied, first, that the restriction afforded an adequate protection, and, secondly, that the risk of injury was sufficiently great to warrant it."

Consequently, in the present case it was not enough that the Federation considered its scheme necessary in order to protect the public, nor that the Federation's view was not unreasonable. The onus rested on the Federation throughout to convince the court (which represents the reasonable man) that in all the circumstances its scheme was necessary.

(3) A restrictive trading agreement which the court finds against the public interest is merely void and is not illegal (s. 20 (3)). Consequently, the court made it clear that it would not issue an injunction against the parties to the agreement as a matter of course, but only if the court's decision was likely to be disregarded and the agreement still carried out.

Re Yarn Spinners' Agreement

This second case to be decided by the court (reported [1959] 1 W.L.R. 154, and p. 133, *ante*) is probably more significant than *Re Chemists' Federation Agreement* (*No. 2*), not only because the court's decision has caused a dramatic upheaval in the cotton industry, but also because the agreement in question and the matters pleaded in its defence were more typical of the kinds of agreements and pleas which the court is likely to encounter in the future.

The agreement was made between the two hundred or so firms engaged in the business of spinning raw cotton into yarn. The spinners sell their yarn to the weavers who weave it into cloth, and the cloth passes from them to the merchant converters who have it printed and finished for sale to tailors, drapers and other users. The spinners are concentrated in a small geographical area in south-west Lancashire, and, not surprisingly, a large section of the population of that area depends on them and the cotton industry generally for employment. The Yarn Spinners' Agreement provided machinery for fixing the minimum price at which the spinners might sell their yarn, and was designed to prevent price wars in times of trade recession in which the bigger firms with greater cash resources might sell yarn at less than the cost of producing it so as to drive out their smaller competitors, and thus capture the whole of the contracted market for themselves.

Ostensibly the minimum price fixed by the agreement was the cost of buying raw cotton at current prices and of spinning it at an operating cost equal to the average costs of the two-thirds of the spinners whose costs were lowest. No allowance was made in the minimum price for profits, but depreciation of fixed capital and a rate of interest on the amount invested in fixed capital were taken into account. In fact, of course, an efficient spinner could make a profit if he sold his yarn at the minimum price ; this was shown by the fact that, except for short periods, since 1950 the price of yarn had consistently been the minimum price under the agreement, and spinning firms had paid dividends during that time.

The spinners defended the agreement on the following grounds under s. 21 (1) (*b*) and (*e*) of the Act : (*a*) that the removal of the agreement would deny the public certain specific and substantial benefits or advantages, namely, (i) the stabilisation of the price of yarn, so that in times of emergency or high demand there would be sufficient equipment and employed labour available to meet it without price increases, and so that in times of recession spinners would spin for stock in order to meet a revival of demand when it occurred, (ii) the encouragement given to spinners to modernise their plant and to compete in quality in the knowledge that their products will fetch not less than the minimum price and (iii) the prevention of a few firms gaining a monopoly which could result from a price war between spinners in times of recession ; and (*b*) that the removal of the agreement would be likely to have a serious and persistent adverse effect on the level of employment in the area where the industry is carried on.

The court rejected the defence under head (*a*) (i), holding that the stabilisation of the price of yarn is not a benefit to the public when it involves, as the respondents admitted, the retention in the industry of a considerable quantity of out-of-date, high-cost equipment and a reserve of under-employed labour, and also the elimination of price competition between spinners, many of whom could compete in price below the minimum fixed by the agreement without selling at less than their costs of production. The respondents contended that these detrimental features of price stabilisation should be disregarded when the court was deciding whether it conferred " specific and substantial benefits " on the public, and should only be taken into account when the court later came to carry out the balancing operation of weighing all detriments to the public against the defences pleaded for the agreement. The court rejected this approach, and said :—

> " If price stability could be obtained without the sacrifice of a free market, it would undoubtedly be a benefit ; if it can be looked at in isolation, it is no doubt a benefit. But we do not think that the proper way of considering this point is to admit price stabilisation as a benefit to the purchasing public, and defer for subsequent consideration the question whether the loss of a free market is a detriment to the public generally. . . . What we have to consider is whether price stabilisation as an alternative to a free market is a benefit to the purchasing public in this particular case."

Price stabilisation held not beneficial

Then the court added, portentously for future cases :—

> " We cannot think that as a general rule it (price stabilisation) is a benefit ; if we were to hold that, we would be going contrary to the general presumption embodied in the Act that price restrictions are contrary to the public interest. There may be particular cases where price stabilisation confers a peculiar benefit sufficiently great to outweigh the loss of a free market, but this is not one of them."

It may be observed that since the detrimental features of all price stabilisation schemes are just those present in the *Yarn Spinners'* case, the court's ruling comes very close to outlawing price stabilisation *per se*.

Defences (*a*) (ii) and (iii) were rejected by the court as not proved. The court seemed undeterred by the prospect that the abandonment of the agreement and a consequential

price war might result in the yarn-spinning industry being concentrated in the hands of five combines. Even in this event the court envisaged that there would still be competition between the five, and no one of them would control the industry. This seems to indicate that the court is not averse to oligopoly if it will work more efficiently and cheaply than a multitude of small firms.

The court's handling of defence (*b*), which related to the effect of the abandonment of the agreement on employment, is the part of its decision which has attracted most public attention. The court readily admitted that for a time the abandonment of the agreement would cause a degree of unemployment in south-west Lancashire far in excess of the national average, and, with some hesitation, it held that this unemployment would be "persistent." But when it came to carry out the balancing operation under s. 21 (1), the court held that this consideration was outweighed by the higher price paid by the public for cotton goods than would be paid in a free market, by the injury done to our export trade in cotton goods by the maintenance of a price for yarn in excess of world prices, and finally, and most important, by the waste of national resources caused by the retention of excess capacity and under-employed labour in the yarn-spinning industry. The court said:—

> "It is in the public interest that labour and capital should be employed as productively as possible, and we consider, therefore, that the excess capacity in the cotton industry is a public detriment . . . The price (of the avoidance of unemployment) would have to be paid nationally. It would be paid not solely or primarily in the price of cotton goods or in the loss to export trade. Though both of these are substantial, we have in mind chiefly the waste of national resources in the form of excess capacity."

The philosophy of Adam Smith and Ricardo has been fully vindicated in these words, and, no doubt, the court acted within the intention of the Restrictive Trade Practices Act in holding as it did. But one is inclined to ask whether we are not so wedded nowadays to the principles of full employment and the virtual immobility of labour, that the now abandoned Yarn Spinners' Agreement is bound to be replaced sooner or later by some form of Government assistance to the spinning industry which will produce much the same effects as the agreement formerly did.

R. R. P.

THE REFORM OF THE MATRIMONIAL JURISDICTION OF MAGISTRATES

THE Report of the Departmental Committee on Matrimonial Proceedings in Magistrates' Courts (Cmnd. 638) was noted at p. 98, *ante*. The committee were under the chairmanship of Mr. Justice Arthian Davies and their membership included a metropolitan magistrate, three magistrates' clerks, a former clerk and at least one other solicitor. The committee have recommended a number of changes in the law administered by magistrates under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949; some are in matters of principle, e.g., wives being required to maintain their husbands, and others are more of a procedural nature. It was outside the committee's ken to suggest alterations in the Guardianship of Infants Acts or affiliation law.

It is emphasised at once that at the moment these are only proposed changes; legislation to make them will be required.

The committee, in addition to suggesting a number of procedural amendments which examination of the Acts revealed as desirable, considered the recommendations of the Royal Commission on Marriage and Divorce in relation to magistrates' orders. Some of these have been adopted but some have not. The Royal Commission, for example, had recommended that the third party accused of adultery with one of the spouses in proceedings before magistrates should have a right to appear and defend the proceedings. At present, where a wife seeks a maintenance order on the ground of her husband's adultery with a named woman or a husband seeks to discharge an existing order or oppose an application for an order on the ground of his wife's adultery with a named man, the named third party cannot intervene in the proceedings to defend himself or herself against these accusations of adultery; the third party, of course, can be called as a witness by either side, but, if not so called, cannot claim to give evidence on his own or be called by the court unless, in the latter case, both sides consent. The committee, by a majority, decided that the procedural difficulties involved in giving a right to intervene were too considerable. These difficulties are not specified in the report, but in view of the practical experience of the members, one can assume that the matter was fully considered. All the same, one may feel that the right of intervention in "third party" proceedings under the Factories Act, 1937, s. 137, and the Food and Drugs Act, 1955, s. 113 (see 101 SOL. J. 435) and proceedings by co-respondents and interveners in the Divorce Court would afford sufficient precedents for devising the necessary procedure.

Other changes recommended by the Royal Commission and not adopted were to allow written evidence by an absent party in variation proceedings and to require payments of maintenance to be made to the court which actually enforces the order. The committee, whilst in favour of increasing the maximum amounts payable under magistrates' orders (£5 per week for a spouse and 30s. per week for a child), felt that it was outside their terms of reference to recommend that these figures (introduced by a statute of 1949) should be made larger.

Grounds for orders

The report contains a draft Bill to consolidate, with substantial amendments, the Summary Jurisdiction (Separation and Maintenance) Acts. The existing grounds on which a wife may seek an order have been amended in a number of minor ways. A conviction on indictment for assault on her at present entitles her to an order provided that her husband was fined more than £5 or sent to prison for more than two months. The committee propose the abolition of that proviso. On the other hand, a summary conviction for an aggravated assault on her, which now entitles her to an order, will do so, under the Bill, only if he has been sent to prison or detention for not less than one month. As she will be able to get an order if he is convicted on indictment of the far more serious offences of grievous or actual bodily harm or wounding without being imprisoned at all, and in

view of the restrictions on imprisonment imposed by the First Offenders Act, 1958, the committee's proposal in this respect is open to question. Another ground on which an order will be obtainable is conviction of the spouse for a sexual offence against a child of the household and a change is suggested in regard to the matrimonial offence of intercourse whilst knowingly suffering from venereal disease.

The report also recommends that (with two exceptions) a husband should be able to obtain a maintenance or separation order against his wife on the same grounds as she can obtain one against him. One exception is that a husband is not to be given the right to obtain an order against his wife on the ground that she has compelled him to submit himself to prostitution; the wife has such a right against her husband—the draft Bill extends the wording of the 1925 statute giving it—but one can well agree with the committee that it was unnecessary to give reciprocal rights to the husband. The other exception relates to neglect to maintain. The wife's right to proceed against the husband for not maintaining her and their children remains; his right to summon her for not maintaining him and their children arises only where his earning capacity is impaired through age, illness or disability and, having regard to her resources, it is reasonable that she should contribute to the maintenance. "Child" in relation to neglect to maintain will include a child of the spouses not legitimated by their marriage.

Custody and other orders

Under the Bill the present requirements of an order as to non-cohabitation, access and payment of a weekly sum not exceeding £5 to the wife will continue, but the Bill proposes to provide that additional requirements may be made. If the husband's earning capacity is impaired by age, ill-health or disability, the court can order the wife (provided, of course, he has proved her guilty of a matrimonial offence) to pay a weekly sum not exceeding £5 to him. The Bill also provides that custody of the children can be committed to the unsuccessful as well as to the successful party or to a third person or even, if appropriate, to a local authority, and, further, where custody is committed to a parent or other individual, the court can direct that the child shall be under the supervision of a probation officer or of the local authority. Maintenance, at a weekly rate not exceeding 30s., may be ordered for each child and the court may order both the complainant and the defendant or either of them to pay this; it can continue after the child is sixteen whilst he is still receiving full-time education or has impaired earning capacity through ill-health or disability.

The Bill proposes to confer wide new powers on magistrates in regard to the children of the spouses. In addition to the powers already mentioned in regard to committing them to the care of a local authority or putting them under supervision, the court may, once it has begun to hear a complaint, have power to make an order for the custody, care, supervision and maintenance of, and access to, the children, even though the complainant's application for relief is dismissed; this power will also apply in variation and revocation proceedings in relation to an existing custody order. Reports from probation officers and child care officers may be called for by the court and statements in them may be given in evidence although otherwise inadmissible. Third parties and local authorities are to be given powers to apply for variation of custody orders.

Changes are proposed in regard to interim orders: they may provide for custody of the children as well as maintenance, but not more than one interim order may be made for the same complaint. The present limit of three months is retained.

At present, the fact that the wife resides with her husband in the same house at the time of the making of the order will usually mean that after three months her order ceases to have effect (*Evans* v. *Evans* [1948] 1 K.B. 175), even though she may wish to leave and have had nowhere to go. Broadly speaking, the Bill's proposal is that cohabitation alone and not mere residence together under the same roof shall cause the cessation of the order. This provision will apply to interim orders also. Cesser of the order by cohabitation will not, however, affect or nullify a committal under the order of a child of the spouses to a local authority or individual, nor the parents' liability to pay maintenance for it nor a supervision order by a probation or child-care officer as mentioned above.

Variation and revocation

Proceedings for variation, revocation and revival will be declared to be not subject to the six months' time limit. Revocation of an order on the ground of adultery by the wife may at present be sought after the dissolution of the marriage, but whether or not an ex-wife has committed *adultery* depends on whether the man named is himself married or not. The Bill proposes to limit revocation for adultery to adultery committed during the subsistence of the marriage. An order made against a wife is and will be, of course, revocable because of her husband's adultery as well as vice versa. The court, when revoking an order on any ground, may leave the provisions as to custody and maintenance, etc., of the children unrevoked. It is also proposed to reverse *Marczuk* v. *Marczuk* [1956] P. 217, which holds that, in proceedings to revoke a wife's order because of her adultery, the fact that the husband has condoned it is no defence for her. Another suggested change in regard to adultery is that, in proceedings for an order, the six months' limit runs from the discovery of the adultery by the complainant and not, as now, from its commission (thus reversing *Teall* v. *Teall* [1938] P. 250).

Lastly, the Bill will alter the unsatisfactory position regarding the variation and revocation of orders in favour of a spouse (generally the wife) who has gone abroad. At present, a summons in magisterial proceedings cannot be validly served outside Great Britain and Northern Ireland save to the limited extent allowed in relation to attachment-of-wages orders by the Maintenance Orders Act, 1958, s. 20. It is proposed under the Bill that, where the "steps to be prescribed by the rules" (*semble*, an air-letter or registered letter) to notify a defendant abroad of pending proceedings in an English magistrates' court have been duly taken, the court may proceed to hear a complaint to vary or revoke an existing order in his absence; this new procedure will not apply to proceedings to obtain a full order. Letters from the defendant in relation to the proposed proceedings may be taken into account on his behalf if he does not appear. This procedure by way of notification to a person abroad by letter will not be usable in order to impose a new or increased obligation on a non-appearing defendant. However, the value of the provision to husbands whose wives have gone abroad and are entitled to draw a large weekly sum in maintenance is plain; at present, however much the husband's financial circumstances may worsen, he can do nothing about getting the order for payment reduced.

As previously stated, the above are proposals and the Bill to give effect to them has not been introduced into Parliament.

G. S. W.

The Practitioner's Dictionary

" HOUSEHOLD "

THIS word is important in many different connections. An obvious example is a gift in a will to the testator's " household servants," but its interpretation is of consequence in other ways and s. 269 (5) of the Public Health Act, 1936, may be referred to by way of illustration. Section 269 empowers local authorities to control the use of movable dwellings but subs. (5) provides that it shall not apply to a case where the movable dwelling is kept by its owner on land which he occupies in connection with his dwelling-house and is used for habitation by " members of his household." Who are the " members of his household " ?

Re Drax ; Savile v. *Yeatman* (1887), 57 L.T. 475, may supply an answer to this question. A testator bequeathed six months' wages to each of his " household servants " who should have been in his service for one year previously to his death. The problem arose as to the meaning of the words " household servants " and Kay, J., found that they meant " the testator's servants who formed part of his household—that is to say, who boarded in the mansion house and took their meals there at the expense of the testator." His lordship concluded that the testator's coachmen and grooms, who did not board in the house, were not included in the gift as they were not members of his " household."

It seems that the term " household " may only apply to an establishment of which the person in question is the head. This follows from *English* v. *Western* [1940] 2 K.B. 156 where a policy of motor insurance excluded liability in the event, *inter alia*, of injury to any member of " the assured's household." The assured, a boy of seventeen, caused injury to his sister (they both lived with their father) in an accident and the clause referred to, which was found to be ambiguous, was construed *contra proferentes* as meaning any member of the household of which he (the assured) was head. The sister was not, therefore, a member of " the assured's household." *Wawansea Mutual Insurance Co.* v. *Bell* [1957] S.C.R. 581 was a very similar case. The Supreme Court of Canada was asked to interpret a policy of motor insurance which expressly excluded liability in respect of the driving by the insured of any automobile owned by " any person or persons of the household of which the insured is a member." The insured lived with an elder brother and while he was driving his brother's car he caused injury to another. Evidence established that the insured paid board to his brother, that his stay with him was of a temporary character, that he was not under the control of his brother and that it could not be said that he shared any responsibility of a householder. The court decided that the insured was not a member of his brother's household and for that reason the policy extended to the risk.

In the course of his judgment Rand, J., distinguished between a person " of " a household and a person " in " a household. Although the insured was not a member " of " his brother's household, like the uncle in *Home Insurance Co.* v. *Pettit* (1932), 143 S. 839, who was temporarily a guest in the home of the insured's father, he may well have been " in " it during the period of his stay.

The word " household " is also important when used in a rather different sense. The meaning of the word " furniture " was considered at 102 SOL. J. 767, but what passes under a gift of " household furniture " or " household goods " (terms which appear to be synonymous) or " household effects " ? Household furniture or goods would seem to include all personal chattels which contribute to the use or convenience of the householder in the house (*Nicholls* v. *Osborn* (1727), 2 P. Wms. 419) or to the ornament of the dwelling (*Field* v. *Peckett* (*No. 2*) (1861), 30 L.J. Ch. 813) but not such things as victuals, guns and pistols used in riding or shooting game. The clock of the house falls within the expression " household goods " if it is not a fixture (*Slanning* v. *Style* (1734), 3 P. Wms. 334).

The term " household effects " receives a much wider interpretation. For example, in *Re Wavertree ; Rutherford* v. *Hall-Walker* [1933] 1 Ch. 837 a bequest of " household effects " was held to pass motor cars, consumable stores, garden implements and tools and movable plants and in *Johnston* v. *Doak* [1953] V.L.R. 678 it was decided that a similar gift included a motor car. In that case Lowe, A.-C.J., found that " the natural meaning of household effects confirms, that without more all household property used or intended to be used in the ordinary operation of her home is included in the expression used by the deceased."

A bequest of " all my household and personal furniture and effects " may also pass a motor car. This was decided in *Re Liverton* [1954] N.Z.L.R. 612 but, as Gresson, J., remarked, " every case must be considered upon the facts and circumstances of the case ; no two are identical."

D. G. C.

SOLICITORS' BENEVOLENT ASSOCIATION

At the monthly meeting of the board of directors held on 4th March, 1959, Mr. B. C. Bischoff, T.D., of London, was elected chairman in place of Mr. A. H. Goulty, whose resignation on medical advice was accepted with much regret. Mr. C. A. Surtees, of London, was elected vice-chairman. Thirty-seven solicitors were admitted as members of the association, bringing the total membership up to 8,390. Twelve applications for relief were considered and grants totalling £939 6s. were made. All solicitors are eligible for membership of the association, and application forms may be obtained from the association's offices, Cliffords Inn, Fleet Street, London, E.C.4, or from any Provincial Law Society or director of the association. A single payment of £21 constitutes life membership ; the minimum subscription to cover annual membership is £1 1s. a year.

BOARD OF TRADE ANNUAL REPORT ON MONOPOLIES AND RESTRICTIVE PRACTICES ACTS

The Board of Trade's Annual Report on the operation of the Monopolies and Restrictive Practices Acts, 1948 and 1953, was published on 27th February (H.M. Stationery Office, price 9d.). It includes a summary of the work and expenditure of the Monopolies Commission during 1958.

THE COMPLEX WORLD OF LAW ON TELEVISION

Capital punishment, equality of justice for rich and poor, law of libel and wire tapping are among the topics to be discussed by three famous legal figures from England, France and the United States of America, in two programmes to be televised on B.B.C. television on 21st March, at 10.5 p.m., and on 28th March, at 10.20 p.m. Lord Birkett will be speaking in London.

PLANNING INQUIRIES

THE number of appeals against the decisions of local planning authorities has increased from 6,553 in 1955 to 6,699 in 1956, and to 6,921 in 1957; it will not be surprising if a further increase is shown when the figures for last year are published. The increasing importance of this branch of the law was stressed by Sir Sydney Littlewood in his article in the JOURNAL on 23rd January, 1959 (p. 62, *ante*), and it is to be hoped that solicitors will make the most of their opportunities in this field. There is a tendency for surveyors and estate agents to conduct the smaller planning appeals and it would be a pity if this branch of the law were to fall to them as taxation has so largely fallen to accountants.

As the supply of land considered by planning authorities as suitable for development becomes exhausted so does planning permission become more valuable. This, combined with the realisation by landowners and their advisers that the judgment of the Minister of Housing and Local Government will often reverse the decision of the planning authority, has led to the increase in the number of appeals.

An applicant for planning permission has one month "or such longer period as the Minister may at any time allow" in which to give notice of appeal. Where the notice is not given within the prescribed time and the Minister will not extend the time limit, a fresh planning application can be made to produce a new refusal notice from which an appeal will lie. The General Development Order, 1950, governs the procedure for making the appeal. Notice is given in duplicate on forms which are obtained from the Ministry of Housing and Local Government, Whitehall, London, S.W.1 (not the planning authority), and should be accompanied by copies of the planning application and decision, together with copies of plans submitted to the planning authority and of relevant correspondence.

It is necessary to state the precise grounds of appeal in the notice. This usually presents no difficulty since the appellant can briefly state the grounds why he thinks that his original application should have been granted. Since he will usually have received a refusal notice containing the reasons of the local planning authority for its refusal he can also state why he thinks that the objections raised are unsound. The reasons in the refusal notice are often not given as fully as one would wish but they are usually enough to indicate the kind of case that the appellant will have to meet.

After the appeal has been lodged the planning authority will be informed of its contents and will have to give the appellant a statement of its reasons for refusal in detail (although this may have been done in the refusal notice). This procedure was introduced by the Minister of Housing and Local Government following the report of the Franks Committee. Where the planning authority is dilatory in supplying this statement the Minister can usually be relied upon to see that it is forthcoming before the inquiry. If an entirely new and unexpected ground for rejecting the appeal is raised at the inquiry itself an objection should be made to the inspector with, if necessary, a request for an adjournment at the expense of the planning authority.

When the Minister has received the appeal he may indicate that he considers that a local inquiry with a public hearing is not necessary and suggest that the parties place their views before him by letter. So far as the appellant is concerned this procedure has the advantage of cheapness, and, where the amount at stake is not large, may be advantageous for this reason. Even in an appeal dealt with by correspondence the Minister's inspector will visit the site accompanied by representatives of both sides who will be there, not to present arguments, but to satisfy themselves that the inspector has seen the premises and their surroundings properly, and that he has not been influenced by the presence of the other party. Experience shows that the appellant need not fear having his chances of success diminished if his appeal is dealt with in this manner. If he requests a public hearing at a local inquiry this will usually be arranged.

Preparing the case

Whether or not it is desirable to call a professional witness, such as an architect or surveyor, will depend on the importance and type of appeal involved. Many planning considerations are basically non-technical and involve common sense and good taste. On the other hand if, for example, an application to build houses or flats is rejected because the density proposed is too high then it will be of advantage to have a witness who is familiar with this kind of issue. The witness for the planning authority will usually have professional qualifications in town planning and on some questions it may be dangerous to have one expert opinion not countered by another. Those familiar with cases involving expert medical witnesses will find that planning is an even less exact subject and offers even more scope for conflicting argument. Needless to say, an expert witness should be selected who is thoroughly familiar with the area and the type of issues at stake.

In preparing the case it may be found that a slight alteration to the proposed development would remove some of the objections of the planning authority without too great a sacrifice of the appellant's interests. Often the appellant will wait until the start of the inquiry before stating that he is prepared to revise his proposal and at this stage he may be met by an objection from the planning authority that the Minister has to decide upon the proposal contained in the planning application and that if a fresh proposal is being put forward, a new application should be submitted in the usual way. Such an objection may be justified and find favour with the Minister, and the best course for an appellant who wishes to amend his application is not to wait until the inquiry but to try to reach an agreement before then. He may in this way avoid the cost of the inquiry altogether.

Strictly speaking, it can be argued that hardship to an appellant is not relevant to a planning appeal where only considerations involving the community are at issue. Evidence on hardship is, however, usually heard without question and seems to receive consideration by the Minister.

Where the planning authority is proposing to quote any authority in support of its case, e.g., a Ministry circular or other publication, the appellant should receive details before the inquiry. For some types of appeal the circulars issued by the Minister give a great deal of information upon the considerations which he considers relevant, an example of this being circular 25/58 which deals with petrol filling stations. Details of previous planning decisions can be found in the *Journal of Planning Law* but it must be emphasised that each appeal depends upon its own facts and that previous decisions are usually of assistance only on matters of principle or if they affect land in the vicinity of the appeal site. The appellant's solicitor will find that it is essential for him to visit the site himself and carefully inspect both it and the surrounding area. No matter how complete they

are, plans, photographs and the statements of witnesses usually either give some false impression or omit some relevant detail.

The inquiry

The appellant will open and it will fall to him to inform the inspector of the physical facts concerning the appeal site and its surroundings. Plans are desirable if not essential for this and the planning authority is well placed to provide them. If possible they should be agreed before the date of the inquiry but if this is not done they can be seen immediately before it opens. They are usually based upon ordnance survey maps and should be carefully examined to see if there have been any changes since preparation. Photographs are seldom necessary since the inspector will visit the site.

Evidence is not given on oath and most inspectors allow witnesses to read their proofs. If two spare copies of the proof are available one can be given to the inspector and the other to the planning authority; this will save the inspector from writing the evidence down in longhand and save a great deal of time. Cross-examination and re-examination follow the normal pattern. The appellant, since he has opened and then called his evidence, will usually wish to address the inspector at the close of the inquiry in reply to the planning authority and to any other interested persons who have put their views forward rather than do so at the end of his case.

Notice of the holding of the inquiry will have been given to the occupiers of nearby properties likely to be affected by the proposal. This may result in a number of them attending the inquiry and they may take the opportunity of making their (often irrelevant) views known. Cross-examination of this type of witness is difficult and is best left alone, unless what they say is so damaging that it requires challenge or unless a point can be made quickly and easily.

After the close of the inquiry the inspector will visit the appeal site with representatives of the interested parties. Needless to say, this is purely an inspection and not the opportunity for further argument.

Costs

The Minister has power to award costs at a local inquiry (Town and Country Planning Act, 1947, s. 104, incorporating s. 290 (5) of the Local Government Act, 1933). This power is used sparingly and will not be exercised in favour of the successful party as such. In *Re Wood's Application* (heard by the Divisional Court on 3rd October, 1952), an application for mandamus, to compel the Minister to exercise his discretion as to costs in favour of the owner of property affected by a planning appeal who appeared at the inquiry, was refused. The applicant was a householder who thought that her property would be adversely affected by the proposal of the appellant, whose appeal was ultimately dismissed.

It should be noted that costs can only be awarded where a local inquiry is held. Instances where there has been an award include one where, although the appellant was unsuccessful, the inquiry was adjourned because of the failure of the planning authority to provide a material witness. In another case the planning authority was awarded twenty-five guineas costs for an appeal against an application which was practically the same as a previous application already rejected by the Minister after appeal. If an appellant abandons his appeal at the last moment, leaving the inspector and the planning authority to make a fruitless attendance at the inquiry, it is thought that costs would be awarded.

If an application for costs is being made it should be made at the close of the inquiry.

A. J. N.

A Conveyancer's Diary

LAW OF PROPERTY ACT, 1925, s. 172

THE affairs of the late Mr. R. N. Eichholz have received a great deal of publicity in the newspapers, and continue to engage the attention of the courts: see *Re Eichholz* [1959] 2 W.L.R. 200, and p. 131, *ante*. Several points were argued in this case, but it is with only one that I propose to concern myself to-day. Shortly after his marriage, and some two years before his death, the deceased gave to his wife and had conveyed into her name a house which he purchased and paid for. After the death an order was made for the administration of the estate in bankruptcy, under s. 130 of the Bankruptcy Act, 1914, and the trustee claimed against the widow to have the house returned to the deceased's estate under s. 172 of the Law of Property Act, 1925. In answer to this claim it was objected by the widow that this section had no application where the estate was being administered in bankruptcy. (This is a considerable simplification of complicated facts, but this statement is sufficient for the point which principally attracted the attention of the court.)

Section 172 (1) provides that every conveyance made with intent to defraud creditors shall be voidable at the instance of any person prejudiced thereby; and s. 172 (2), that the section does not affect the law of bankruptcy for the time being in force. The statute 13 Eliz. 1, c. 5, which s. 172 replaces, was in its language somewhat more splendid as well as more verbose. It applied, as its preamble states, to feoffments, gifts, grants, etc., "devised and contrived of malice, fraud, covin, collusion and guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortmains and reliefs . . . to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued." But its effect was the same, as Harman, J., has now in terms held. First, the statute of Elizabeth was available after a man's death to his creditors to recover property from a volunteer (Seton, Judgments and Orders, 7th ed., p. 2280). Secondly, it is not necessary to prove a fraudulent intent to take advantage of the statute: "When a settlement is not founded upon valuable consideration, it may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement would necessarily have that effect" (*per* Lord Hatherley, L.C., in *Freeman* v. *Pope* (1870), L.R. 5 Ch. 538). Thirdly, if by the application of the statute the property is considered to remain as part of the estate of the insolvent, the person holding it is treated as an executor *de son tort* (May on Fraudulent Conveyances, 3rd ed. (1908), p. 18).

All these points were decided or made in reference to the statute of Elizabeth, but in the judgment of Harman, J., they all continue to be good law under s. 172.

After these general observations, the learned judge dealt with the main argument already mentioned, that administration in bankruptcy excluded the section. This argument was founded on the decision in *Re Gould* (1882), 19 Q.B.D. 92. (The Charles Osborne Gould in that case was, I think, the financier. In any case, the amount involved must have been considerable, for when the official receiver, as trustee of the estate, had had his motion to set aside a post-nuptial settlement dismissed at first instance, and that decision had been upheld by a unanimous Court of Appeal, he attempted, without success, to obtain leave to appeal to the House of Lords.) In *Re Gould* it was held that the predecessor of s. 42 of the Bankruptcy Act, 1914, which provides for the avoidance of certain settlements made by bankrupts, had no application to the administration of the estate of a deceased insolvent under the predecessor of s. 130 of the 1914 Act. The reason for this decision was that s. 130 is not intended to enlarge the assets to be administered by the inclusion in the deceased's estate of what belongs to other persons; and it was pointed out that the Court of Chancery in the administration of the estates of persons who died either solvent or insolvent had been in the habit of administering only the property of the deceased, and not the property of others. The general view was that it would have required very clear language in the Act to enlarge the assets so as to include the property of others, and nothing like that could be found in the Act. It was said in *Re Eichholz* that this reasoning, or some of it, applied equally to s. 172.

If it did, the result would have been a strange one, as Harman, J., pointed out: the deceased's widow would then, by making an application for the estate to be administered in bankruptcy *ex parte* and without notice to the creditors, have been in a position to put the property acquired in fraud of them out of their reach. But he held that s. 172 had nothing to do with bankruptcy—a man whose estate is administered under s. 130 of the Bankruptcy Act cannot properly be described as a bankrupt. " It would, indeed, be anomalous if proceedings under s. 172 would lie while a Chancery administration was proceeding (as *Freeman* v. *Pope*, already cited, clearly shows it does . . .), but should cease to lie because the aid of s. 130 was called in to regulate the creditors' rights. I reject this argument." This is a clear authority showing the universality of the remedy under s. 172 and underlining its kinship with its predecessor, the statute of Elizabeth.

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RELIEF OF THE AGED, IMPOTENT AND POOR

In *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council* [1959] 2 W.L.R. 308, and p. 154, *ante*, there is an interesting observation in the speech of Lord Keith of Avonholm. His lordship said ([1959] 2 W.L.R. at p. 320): " In the days when hospitals trained their own nurses, independently of outside regulation, and were treated as charitable institutions, it was not, as I understand it, because they trained nurses for sick nursing that they were treated as charitable institutions but because they were established for nursing the *sick poor* " (my italics). This takes one back to such cases as *Re Robinson* [1951] Ch. 198 and *Re Lewis* [1955] Ch. 104, and makes one wonder whether they were rightly decided. The statute 43 Eliz. 1, c. 4, in its famous preamble mentions as one head of charity the relief of " aged, impotent and poor people." Should the conjunction be read as a conjunction, so that in order to qualify an aged or an impotent (i.e., in modern language, sick) person must also be poor; or disjunctively, so that this head be treated as comprising three separate and distinct sub-heads, the aged, the sick, and the poor? This has long been a matter of debate. In *Attorney-General* v. *The Haberdashers' Company* (1834), 1 My. & K. 420, at p. 428, Lord Brougham said: " It is expressly laid down by a very high authority on this subject, Serjeant Moore, who drew the statute of charitable uses [i.e., 43 Eliz. 1, c. 4], that a gift to the aged of such a parish is not a charity within the statute unless it expresses that they are also poor; for *non constat* they may not be rich." In *Re Lewis* (a case of a gift for ten blind girls and ten blind boys, Tottenham residents if possible, with no condition as to poverty) Roxburgh, J., following *Re Robinson* and some other recent decisions on gifts for the aged, held that the words " aged, impotent and poor " in the statute had to be read disjunctively, so that a gift for the relief of aged persons *simpliciter*, a gift for the relief of sick persons *simpliciter*, and a gift for the relief of poor persons *simpliciter*, all qualified as good charitable gifts. This was a careful decision, and it settles the matter as far as a court of first instance is concerned. And yet I have often doubted whether in medieval Christendom, when the foundation of our law of charities was laid, poverty was not an overriding qualification; and it is worth noting that the reputed author of the statute of Elizabeth tended to that view. If there is any substance in this doubt, then, except in the cases of the charities which fall under distinct heads of their own (the advancement of religion, the advancement of education, and the amorphous fourth head of Lord Macnaghten's classification, which have followed their own line in this respect), it is only the sick poor and the aged poor who are truly objects of charity—millionaires, even if on their death beds or as old as Rockefeller, do not qualify. And it is interesting to see that an eminent jurist from Scotland, whose law on this subject is distinct from that of England (*Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association* [1953] A.C. 380; 97 Sol. J. 208), seems to take this view also. Perhaps one day we shall have the views on this matter of the House of Lords, which in general, I think, is not quite so " charity-minded " as the judges of the Chancery Division, and may reach a different conclusion from that in *Re Lewis*, *supra*, and the other recent cases on this point.

" A B C "

OBITUARY

Mr. S. G. CRILL

Mr. Sydney George Crill, solicitor, of the Royal Court of Jersey, died on 3rd March, aged 80.

Mr. E. W. HINCHLIFFE

Mr. Ernest William Hinchliffe, solicitor, of Halifax, died on 25th February, aged 81. He was admitted in 1901.

Mr. H. W. PERKINS

Mr. Harold Wootton Perkins, solicitor, of London, died on 3rd March, aged 82. He was admitted in 1900.

Personal Notes

Mr. A. W. Wood, solicitor and clerk to the Yorkshire Ouse River Board, Leeds, retired on 28th February.

Landlord and Tenant Notebook

HOLDING OVER AND CONTINUATION

BEFORE the days of statutory security of tenure, "holding over" was used to describe what Lord Mansfield called, in *Right d. Flower* v. *Darby* (1786), 1 T.R. 159, a "tacit renovation of the contract." "If nothing were said by either party as to terms," Lopes, L.J., said in *Dougal* v. *McCarthy* [1893] 1 Q.B. 736 (C.A.) "it follows from such holding over, by implication of law, that there is to be a tenancy from year to year on the same terms as those of the lease which has expired, so far as they are not inconsistent with such a tenancy."

Lord Mansfield may have learned, before he left Scotland, that in his native country a tenancy by holding over is, with greater accuracy, called a tacit relocation. The essential element of agreement was emphasised by *Morrison* v. *Jacobs* [1945] K.B. 577 (C.A.), deciding that when the tenant of rent-controlled premises retained possession, paying the old rent, after expiration of a fixed term he was presumed to do so as a statutory tenant. "At common law, if at the expiration of a tenancy a landlord has acquired a right to claim possession against his tenant and instead of exercising that right he allows him to remain in the house and accepts rent from him as before, the parties by their conduct may, with reason, be held to have entered into a new contract of demise . . . When the tenant remains in possession, not by reason of any such abstention by the landlord, but because the Rent and Mortgage Interest Restrictions Acts deprive the landlord of his former power of eviction, no such inference can properly be drawn" was how Mackinnon, L.J., explained the position.

The "Notebook" drew attention to the increasing use of the expression "business statutory tenancy," to describe a tenancy artificially continued by Pt. II of the Landlord and Tenant Act, 1954, on 18th January, 1958 (102 SOL. J. 46), commenting on the merits and demerits of the term. "Holding over" is actually used in the marginal heading of the Landlord and Tenant (Temporary Provisions) Act, 1958, s. 2, to describe the position of one who is not even a statutory tenant. But the importance of not confusing statutory extensions with tacitly agreed renewals has now been illustrated by *Cornish* v. *Brook Green Laundry, Ltd., and Others* [1959] 2 W.L.R. 215 (C.A.); p. 130, *ante*.

Effect of negotiations

The applicant in the recent case had sought a new tenancy of a confectioners', newsagents', stationers' and tobacconists' shop which she and her mother before her had occupied and run for some fifty years. Until 1949, she had held direct of the freeholders, the second respondents to the application; but in that year they had granted a seven years' lease, running from Michaelmas, of the shop and the shop next door to the first respondents. And in 1950 the latter had granted a sub-lease to the applicant which expired on 26th September, 1956.

In the meantime the Landlord and Tenant Act, 1954, Pt. II, had come into operation and (the first respondents occupying the adjoining shop for the purposes of their business) s. 24 (1) applied to both lease and sub-lease: "a tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act," etc.

Somewhat protracted negotiations then followed (i) between the first respondents and the applicant, for the grant of a new sub-lease to her, on the assumption that they would obtain a lease from the second respondents; and (ii) between the first and second respondents, for the grant of such a lease. The second-mentioned negotiations ultimately produced on 18th January, 1957, an offer of a new lease, to run till Lady Day, 1967, conditional on the first respondents effecting certain specified repairs and carrying out any necessary sanitary works by 25th March, 1957. The first respondents accepted this offer on 9th April, having in the meantime suggested to the applicant that she should remain in possession as a monthly tenant, they having paid the increased rent asked for; on 4th July they offered the applicant some alternative accommodation, which she refused, and on 12th July her solicitors wrote asking for proposals for a new lease of the premises which she occupied, at the same time mentioning that they had served notice on the second respondents (or their *cestui que trust*, but nothing turned on that). Something like a comedy of errors ensued.

The competent landlord

While the applicant had commenced negotiations with the first respondents on the assumption that they would obtain a new lease from the superior landlords, it now occurred to her advisers that, having regard to the special provisions relating to mesne tenancies, she might be barking up the wrong tree. For the Landlord and Tenant Act, 1954, Pt. II, has brought into being, for its own purposes, a "competent landlord" (whether or not he is the immediate landlord) "who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(*a*) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (*b*) that it is either the fee simple or a tenancy which will not come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord, and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions" (s. 44; Sched. VI, para. 1).

Mesne tenant's status

While, in August, 1957, the first respondents' solicitors wrote to the applicant's solicitors taking the point (which was ultimately established) that their clients were, by virtue of the statutory continuation brought about by s. 24 (1), her landlords, their negotiations with the second respondents then produced on 12th September a letter from the second respondents enclosing the counterpart of a 10½ years' lease from Michaelmas Day, 1956; stating, however, that they would be asking the estate surveyor whether the works agreed had been sufficiently completed to enable the lease to be granted. On the strength of this, the first respondents' solicitors wrote to the applicant's solicitors on 17th September, saying: "Our clients hold the premises by virtue of an agreement for a lease dated 18th January, 1957, for a term of 10½ years from Michaelmas Day, 1956, to Lady Day, 1967."

The applicant made her application against the first respondents a few weeks later. It was nearly a year later

that she added the second respondents (who took no active part in the proceedings). In the meantime the first respondents put in an answer opposing the application on the grounds that they intended to occupy the premises for the purposes of their own business and that they had offered the applicant suitable alternative accommodation. They described themselves, in their notice as delivered, as tenants under an agreement for a lease having less than fourteen months unexpired at the date of termination of the applicant's current tenancy, the second respondents being their landlords ; later, they amended this part of the answer by giving, as an alternative, " a lease continued by virtue of s. 26 of the Landlord and Tenant Act, 1954 " ; and they had, in between, in fairness, informed the applicant that they had been advised that the " agreement " was but a conditional offer.

The five years

As the alternative accommodation offered was held to be insufficient, the limitation on s. 30 (1) (*g*) (opposition on the ground of intention to occupy) contained in subs. (2) became vitally important. " The landlord shall not be entitled to oppose an application on the ground specified in para. (*g*) . . . if the interest of the landlord . . . was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy . . ."

For if the first respondents held under a new lease, their interest had been created within the five years, and they were disqualified from opposing the application on the ground that they intended to occupy the shop for purposes of their own business.

Walsh v. *Lonsdale*

The applicant relied on the principle established in *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9 (C.A.), as stated by Cotton, L.J., in *Lowther* v. *Heaver* (1889), 41 Ch. D. 248 (C.A.) : " A tenant holding under an agreement for a lease of which specific performance would be decreed stands now in the same position as if the lease had been granted." The county court judge, taking the view that the first respondents had studiously abstained from fulfilling their obligation to repair, held that this failure did not make them any the less *Walsh* v. *Lonsdale* tenants.

This reasoning, it was held in the Court of Appeal, did not warrant the conclusion that in September, 1957, the first respondents could have sued the second respondents for specific performance of the conditional agreement. They had, at that time, no title under the *Walsh* v. *Lonsdale* equity. Payment of the higher rent was, it was held, referable to implied agreement (this, I submit, would be the weakest link in the chain of reasoning).

The continued tenancy

The Court of Appeal adopted the views expressed by Denning, L.J., in *H. L. Bolton Engineering Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* [1957] 1 Q.B. 159 (C.A.), and by Harman, J., in *Weinbergs Weatherproofs, Ltd.* v. *Radcliffe* [1958] Ch. 437, on the nature of the relationship brought about by the operation of s. 24 (1) : " The common-law term subsisted with a statutory variation as to the mode of determination " ; " the term must be thought of as continuing by way of a statutory extension." These and other authorities were discussed in the " Notebook " for 18th January, 1958 (102 Sol. J. 46).

The fact that the variation and extension paid no regard to 50 per cent. of Coke's " the terme must have a certaine beginning, and a certaine end " (I, 58), would not matter, and the court rejected an argument founded upon the definition of " tenancy " in s. 69 : " . . . created either immediately or derivatively out of the freehold, whether by a lease or underlease . . ." being satisfied that there was no intention to exclude continued tenancies.

The question whether a tenant holding for an indefinite term can sub-let for an indefinite, or indeed for any, term, does not appear to have been mooted. The answer would, I submit, have been that he can : the possibility was discussed in the " Notebook " for 23rd January last (p. 70, *ante*).

R. B.

HERE AND THERE

GETTING YOU TYPED

I HAVE never yet met anybody who, on first hearing a recording of his own voice, did not react first with incredulity and then with a sense of stunned humiliation. What ! That supercilious intonation which, if I heard it from anybody else, would make me take an instant dislike to the fellow, can it really be mine ? It is generally most unjust to speak of a talkative man as " liking the sound of his own voice." Unless he happens to be an actor with a deliberate artistry in voice production, he never does hear the sound of his own voice at all. What fascinates him is his own irresistible logic and dazzling wit. He never realises that other people simply don't notice either the logic or the wit in their agony at the horrible quality of the mere sound. But, if the poor fellow has a misleading vision of himself, it only matches the false picture that everybody has of everybody else. People are, for some reason, desperately anxious to classify everyone they meet and accordingly they carry about in their heads neat little ready-made categories for the purpose, becoming bitterly resentful of any personality that seems intractable to classification. I remember overhearing a middle-class lady reporting how the benefactor of some working-class youth had " made a perfect gentleman of him, brown kid gloves and all," a judgment which told one little about the youth but much about the lady, and her vision of perfection.

MARK OF IMPORTANCE

I WAS reminded of the phrase by a passage in the evidence of a recent case at Colombo when a witness, referring to two detectives who interviewed him, said : " They seemed to be persons of importance. They wore trousers "—as one might say, " He seemed to be a person of great sanctity. He wore a halo." That in any nation in the world to-day, the mass-produced, mass-advertised, mass-marketed trousers should still be a badge of distinction is beautifully reassuring. Nothing is banal if only you can see it with fresh and unsophisticated eyes. All travel agencies must henceforth ensure that no client of theirs shall dream of visiting Ceylon trouserless ; only so will he achieve " V.I.P." status. They should add some expert warning about the garments which, at the other end of the scale, will brand him as a " T.U.P." (or Totally Unimportant Person). It would be embarrassing indeed if a

Highland chieftain in full kilted splendour found himself rated below a detective sergeant. It is amusing, incidentally, to remember that the first modern trouser-wearers were the "Sans-culottes" of the French Revolution, rebels against the knee-breeches of the aristocrats and the old régime. How they have since risen in the scale of social values.

ALL CLASSIFIED

So now we know that a bystander in Colombo says, "He is an important person; look at his trousers," as the Covent Garden bystander said of Professor Higgins in the first scene of "Pygmalion" (or was it "My Fair Lady"?): "He's a gentleman; look at his boots. She thought you was a copper's nark, sir." Only there is this difference, that now the copper and his nark have become persons of importance, just as the fashion of the "Sans-culottes" has become a mark of distinction. Once upon a time the recognised mark of respectability was to keep a gig. We know that from a chance report of the trial of Thurtell, Hunt and Probert for the rather squalid murder of William Weare in 1823. Probert, reported the *Morning Chronicle*, "maintained an appearance of respectability and kept a gig." This was seized on with ferocious delight by the writers of the day, particularly Carlyle, and "gigmanism," "gigmanity" and "gigmania" were long synonyms for just that sort of respectability that Probert and his friends represented. Among the images cherished in people's imaginations that of the archetypal solicitor is naturally prominent, only it varies strangely with the individual. I cherish particularly one published description of Mr. Molotov: "His dark-coloured suit, his bespectacled poker face, his thin hair and small moustache would give a stranger the impression that he was a middle-class professional man—probably a solicitor." Do you like that portrait? No? Well, try another. A young lady had had her £250 fur coat snatched from her shoulders by a stranger at a bus stop. This is how she described him: "I had no reason to suspect the man. He looked like a solicitor—about thirty-two and rather handsome. He wore an Anthony Eden hat." Since, as I said, people love to get everyone taped and classified, young students at The Law Society who wish to be conformist can choose the type to which they would rather conform.

RICHARD ROE.

Country Practice

MERGER IN THE RED BARN

I AM not greatly irritated by bits in the daily and weekly Press all about life in the country. All the same, I have sometimes wanted to stage a counter-attack; to describe a neat little flat in Chelsea or Earls Court, and the charming but incomprehensible life as lived in the depths of a town. The sound of an early milk roundsman . . . the smell of the first bus . . . the sun gilding the disconnected neon sign outside the launderette . . .

What prompted me to develop the *rus in urbe* theme was a recent dabbling in High Finance. A company take-over, in fact. Quoted, too. Fascinating. And if anyone thinks that a country lawyer had better stick to his last will and testament and other safe forms of solicitor-like activity, and not pose as a company lawyer, well, he is probably right. Nevertheless with the help of a telephone, a printer round the corner, and a London agent, most things are possible.

A take-over bid can be looked at from many different angles, and the same take-over bid can have several different appearances—depending always on the angle of approach. One harassed chairman, after four successive bids, wrote me in these words: "We have had our troubles, largely due to outside interference by self-seeking concerns for whom the word 'harpies' would be an apt term. In this material age, money-making seems to have gained the ascendant in man's ambition. I am afraid the old story of the golden calf in modern guise still holds sway."

Speaking of this outlook, a financier acquaintance of mine asked: "Did the original prospectus make it clear that money-making was to be of secondary consideration?" And, of course, shareholders in a public company *expect* to gain financially—why take shares otherwise? To a director, therefore, a take-over bid is an occupational risk; lamenting man's acquisitive instincts is of little use. A private company can withstand a take-over bid quite well; but I am afraid that it is now regarded as bad form for the director of a public company to criticise anyone who wishes to acquire the majority of the share capital.

How to acquire the majority of the share capital is, of course, the 64 million dollar question. Messrs. Clore, Fraser and Wolfson have all carried out practical research on the problem—Highfield is the latest name to be added to the list of researchers in this field.

Have you ever glanced through the Prevention of Fraud (Investments) Act, 1958? Those who have, might care to demonstrate their grasp of the subject by having a go at the following questionnaire:—

> Do any of the following incidents make you liable to prosecution:—
>
> 1. You write to a friend asking him if he would like to buy some shares in *X*, Ltd.—the shares at present belonging to (*a*) you, (*b*) a deceased client of yours?
>
> 2. Knowing your friend has some shares in *Y*, Ltd., you send him a newspaper cutting in which readers are advised to sell such shares, and you tell him that, if he is thinking of selling, you could probably find a buyer?
>
> 3. On leaving the eighteenth green you ask your opponent (not being a stockbroker) if he would care to sell you some of his shares in *Z*, Ltd.?

The answer to all the questions is, yes. If you happen to be a licensed dealer in securities, you are safe; but for all ordinary mortals, the Director of Public Prosecutions could authorise a prosecution, and you would be found guilty. As for financial tips culled from newspapers, your newsagent is statutorily immune from prosecution, if he sells the newspaper in the ordinary course of his trade. If, however, he gives you a look, places one finger on the City page and the other on a share certificate lying on the counter . . . why, the fellow is a criminal. If you don't believe me, tell your articled clerk to look up s. 14 (4).

The law is even more exacting when it comes to sending out letters to shareholders asking if they wish to sell at a certain price. Any solicitor contemplating such a rash act had better ring up the Board of Trade for prior approval.

And then he had better submit a copy of the proposed circular to the same department. And then he had better send an advance copy, as approved by the Board of Trade, to the board of the company intended to be circularised. And then wait a further forty-eight hours before daring to post the circulars to the shareholders. Long before then, of course, he may have decided that he might just as well leave the whole task to a licensed dealer (or "outside broker"); no Board of Trade consent is then necessary, because an outside broker's circulars do not need the same supervision as a solicitor's.

Those readers who are inclined to treat this subject seriously may be interested in a very helpful new book—"Business Mergers and Take-over Bids," by Ronald W. Moon (reviewed at p. 197, *ante*). With this book in one hand, and an ambitious capitalist (or distracted director) in the other, quite interesting situations can develop.

As for solicitors in the City, would they please not write indignant letters to our sorely tried editor, complaining of my gross inaccuracies? Instead, how about contributing an article on the Milk and Dairies Regulations?

"HIGHFIELD"

REVIEWS

The Modern Law of Real Property. Eighth Edition. By G. C. CHESHIRE, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law. With an Appendix on the Rent Acts by J. B. BUTTERWORTH, M.A., of Lincoln's Inn, Barrister-at-Law. 1958. London: Butterworth & Co. (Publishers), Ltd. £2 15s. net.

In the last edition of this his most widely read work the author made extensive rearrangements in the order of treatment of various topics, most notably in the case of interests in land less than the fee simple absolute in possession. These were arranged in two broad divisions, the first comprising what might be called "family" interests (those arising under a strict settlement or a trust for sale), and the second comprising what the author calls "commercial" interests (leaseholds, easements, restrictive covenants and the like). This arrangement is maintained with only minor modifications: e.g., the section on the methods of creating settlements and trusts for sale has been transferred to the part of the book which deals specifically with conveyancing, where it is less likely (appearing as it does now at a later stage of his instruction) to confuse the student with its detail. The author confesses that this attempt at rearrangement aroused little attention and still less enthusiasm. That is perhaps not very surprising. To the student (the best customer for this book, as the book is the best guide for the student in its field) any sequence of instruction in so wide-spreading a subject as this is acceptable if the treatment is clear, comprehensive, and aptly and succinctly illustrated by authority: nothing which Dr. Cheshire has written has ever lacked these qualities. The practitioner's needs (and the number of occasions on which it is cited in court indicates that this is a practitioner's book as well as a student's manual) are not dissimilar: a good index is his only additional requirement, and the index to "Cheshire" is very good. Nevertheless, the attempt to achieve an increasingly effective order of arrangement is not to be discouraged, and if anything further on these lines is projected, will the author look at his chapter on leaseholds? There are here at least three matters which appear in inconvenient or illogical places. First, the section on the right to security of tenure (viz., agricultural holdings and business premises: the Rent Acts have a long appendix to themselves) appear under a general heading: "Position where there are no express covenants or conditions," which contrasts with another heading, "Position where there are express covenants and conditions." Statutory security of tenure does not, of course, depend on any express covenant or condition; but neither does it depend (as the juxtaposition of these headings suggests) on the absence of express covenants and conditions. Secondly, the main treatment of s. 40 of the Law of Property Act, 1925, is in relation to tenancy agreements; the section is mentioned only casually in relation to contracts for the sale of land, contracts of at least equal importance with tenancy agreements for this purpose. And thirdly, *Walsh* v. *Lonsdale* also receives full treatment in the chapter on leaseholds. True, the agreement in the case was one for a lease and not for the sale of the fee simple, but the doctrine associated with this decision is fundamental, applying as it does to all interests in land. To single these matters out for treatment principally as part of the law of leaseholds is to put them in the wrong perspective.

Archbold. Pleading, Evidence and Practice in Criminal Cases. Thirty-fourth Edition. By T. R. FITZWALTER BUTLER, of the Inner Temple and Midland Circuit, Barrister-at-Law, Recorder of Newark, and MARSTON GARSIA, of the Middle Temple and South Eastern Circuit, Barrister-at-Law. 1959. London: Sweet & Maxwell, Ltd. £5 5s. net.

Archbold was first offered to members of the legal profession in 1822 and for the greater part of the time which has passed since that year it has been accepted as a standard work on the law relating to criminal pleading, evidence and practice. To-day, at least, few practitioners and others concerned with the administration of justice would choose to be without it and for this reason a new edition, after a lapse of nearly five years, is to be welcomed.

Since the appearance of the 33rd edition the criminal law has experienced many changes. Large sections of the book have been re-written to take into account the important provisions of the Road Traffic Act, 1956, the Sexual Offences Act, 1956, and the Homicide Act, 1957, and references to many of the recent decisions on points of law, evidence and procedure have been included. At the same time, some very old authorities and some matters which are regarded as obsolete have been omitted. In the section on riot, the authors have mentioned the doubts expressed by Lord Goddard, C.J., in *R.* v. *Sharp* [1957] 2 W.L.R. 472, as to whether it is now necessary to show force or violence displayed in such manner as to alarm at least one person of reasonable firmness, but the fact that his lordship also suggested that "a riot may involve no noise or disturbance" is not recorded. Several recent decisions on conspiracy, notably *R.* v. *Hammersley* (1958), 42 Cr. App. R. 207, have led to the substantial amplification of this section.

The general appearance of the work remains unaltered, but in some places the text has been broken up into shorter paragraphs and there has been a more liberal use of bold headings. As this is, essentially, a book for the practitioner and not the jurist, these changes are sure to make the work easier to use and therefore of even more value.

The 34th edition of Archbold is intended to be a complete statement of the law up to 1st July, 1958. The first supplement is dated 1st January, 1959, and we were surprised to find that it did not contain a reference to *Griffin* v. *Squires* [1958] 1 W.L.R. 1106. Most practitioners are frequently confronted with road traffic offences and we would have thought that any decision which interprets the provisions of the Road Traffic Acts would have been of interest to them. It is true that the main work does not deal with s. 121 of the Road Traffic Act, 1930, and it may be that this confirms our suspicion that those sections dealing with the law relating to road traffic could be expanded with profit in the next edition.

Wurtzburg's Building Society Law. Eleventh Edition. By JOHN MILLS, O.B.E., B.A., of the Middle Temple and Lincoln's Inn, Barrister-at-Law, assisted by BRYAN J. H. CLAUSON, M.A., of Lincoln's Inn, Barrister-at-Law. 1958. London: Stevens & Sons, Ltd. £2 10s. net.

"Wurtzburg" is not only a lawyer's book, it is used extensively within the offices of building societies, and much of the matter which it contains is primarily of interest there and there only. But in the last edition, which was the first to appear under the present editorship, the parts of the book which deal with the aspect in which building societies most frequently present

themselves to lawyers—that of mortgagees of house property—were greatly strengthened as compared with previous editions, with the result that the book became, among other things, the best and most up-to-date guide to the law and practice relating to the enforcement of mortgages. In this edition it is again these sections which have received most attention, by existing matter being brought up to date and new added where necessary. Of particular interest and utility to the lawyer are the new or expanded sections on the following matters: mortgages of freehold and leasehold flats and maisonettes (pp. 100–103); prior mortgages (p. 104); variable interest rates (pp. 115–117); "the unwanted occupier"—a particularly useful resumé of the case law since 1950 (pp. 127–128); the Rent Act, 1957—although this was, of course, written before *Alliance Building Society* v. *Pinwill* [1958] 3 W.L.R. 1 (p. 131); and vacant possession-procedure, containing a valuable discussion of the position of the deserted wife in relation to mortgaged property (p. 163 *et seq.*). Mr. Mills's re-editing of "Wurtzburg" was warmly welcomed when the last edition appeared. This is in every way a worthy successor.

Oyez Practice Notes, No. 17: Young's Taxation Appeals. By H. G. S. PLUNKETT, Barrister-at-Law. 1959. London: The Solicitors' Law Stationery Society, Ltd. 15s. net.

Since the first edition of this valuable little book was published in 1949, the Finance Act, 1958, has extended the time limits for taxation appeals, claims and elections; while the tax tribunals of the General and Special Commissioners, the Board of Referees and the Lands Tribunal in England and Wales have all been brought under the general supervision of the Council on Tribunals constituted under the Tribunals and Inquiries Act, 1958. The Income Tax Act, 1952, too, has necessitated the alteration of almost all the references to the statutory provisions contained in the earlier work. The new edition incorporates the changes made in statute and case law since 1949, including the far-reaching decision of the House of Lords in *Edwards* v. *Bairstow and Harrison* (1955), 99 SOL. J. 558. The book deals with appeals relating to income tax, profits tax, excess profits tax, excess profits levy, the special contribution and estate duty (land values). On the conduct of appeals it has much useful advice to offer, while the chapter devoted to the preparation and revision of stated cases is of particular value and will be of interest to taxpayers and inspectors of taxes alike. The text sets out in tabular form the several matters falling within the jurisdiction of the different tribunals and there are some forty pages of appendices which bring together a number of rules, regulations, forms and statutory material relating to appeals.

Altogether this "Practice Note" contains a wealth of information which cannot be found elsewhere except by diligent searching, and much sound advice and practical guidance for those who are not too familiar with the procedure generally.

Hanson's Death Duties. Third Cumulative Supplement to Tenth Edition. By HENRY E. SMITH, LL.B. (Lond.), formerly Assistant Controller of Death Duties, assisted by P. H. FLETCHER, LL.B. (Lond.), of Lincoln's Inn, Barrister-at-Law, and of the Estate Duty Office. 1959. London: Sweet and Maxwell, Ltd. £1 1s. post paid.

This supplement states the law as at 1st January, 1959, and deals chiefly with the estate duty provisions of the Finance Act, 1958.

BOOKS RECEIVED

Palmer's Company Law. Twentieth Edition. By CLIVE M. SCHMITTHOFF, LL.D., of Gray's Inn, Barrister-at-Law, and T. P. E. CURRY, M.A., of the Middle Temple, Barrister-at-Law. pp. civ and (with Index) 1258. 1959. London: Stevens & Sons, Ltd. £6 6s. net.

The Sanctity of Contracts in English Law. The Hamlyn Lectures, tenth series. By Sir DAVID HUGHES PARRY, Q.C., M.A., LL.D., D.C.L., an Honorary Bencher of the Inner Temple, Professor of English Law in the University of London. pp. viii and 77. 1959. London: Stevens & Sons, Ltd. 12s. 6d. net.

Cases on Equity and Trusts. By G. W. KEETON, M.A., LL.D., of Gray's Inn, Barrister-at-Law. pp. xxv and 284. 1959. London: Sir Isaac Pitman & Sons, Ltd. £2 10s. net.

The Constitution and Powers of Parish Councils and Parish Meetings. Second Edition. By CHARLES ARNOLD-BAKER, B.A., of the Inner Temple, Barrister-at-Law. With a preface by the Rt. Hon. HENRY BROOKE, M.P., Minister of Housing and Local Government. pp. viii and (with Index) 40. 1959. London: The National Association of Parish Councils. 2s. net.

Tax Planning with Precedents. Third Edition. By D. C. POTTER, LL.B., of the Middle Temple and Lincoln's Inn, Barrister-at-Law, and H. H. MONROE, M.A., of the Middle Temple and the Northern Circuit, Barrister-at-Law, assisted by STEWART BATES, M.A., of the Middle Temple, Barrister-at-Law. pp. xxxii and (with Index) 439. 1959. London: Sweet & Maxwell, Ltd. £2 10s. net.

"THE SOLICITORS' JOURNAL," 12th MARCH, 1859

On the 12th March, 1859, THE SOLICITORS' JOURNAL published a letter from a subscriber: "Though an old member of the profession, it has so chanced that my vocation has not led me to the courts of law for many years. I had recently to superintend a case involving matters of considerable amount and the handling of numerous papers. I was introduced into a small den furnished with a very narrow seat, which I was informed was provided for the attorneys who were responsible for the conduct of the suits of their respective clients. The only possible place for laying out the various documents ready for handing on demand to counsel for the Crown was the dirty floor of this den, this floor being in fact a narrow passage in constant use by the officers of the court in handing backwards and forwards books called for by the Bar and the Bench and by other persons creeping backwards and forwards, so as not to interfere with the direct line of vision between the judges and the counsel. The existence of such a biped as an attorney seemed to be altogether ignored in the court. . . . Surely the attorneys are at least entitled to a table whereon to lay their documents and to take notes in the course of the proceedings without interruption. What are our great law associations about that such a scandalous state of things should have been allowed to exist at this time of day?"

Honours and Appointments

Mr. F. C. ADAMS, solicitor, of Kidderminster, a local alderman, has been elected Mayor of Kidderminster.

Mr. KENNETH GOODACRE, T.D., clerk of Middlesex County Council, has been appointed clerk of the peace.

Mr. W. G. E. LEWIS has been appointed deputy clerk of Aldridge Urban District Council.

Mr. R. E. WOODWARD has been appointed clerk and chief executive officer of the Mersey River Board.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

Prejudicial Evidence against Motorists

Sir,—Messrs. W. H. Creech and Douglas raise an important question in their letter and you have made an interesting comment upon it. I am no longer a practising solicitor, but I had considerable experience as such and spent some years as a whole-time justices' clerk. During that time I found that the police in this part of the country were most careful not to introduce evidence of apparent consumption of alcohol, except on the hearing of a charge of driving, or being in charge, under its influence. Indeed, I have known many cases in which the police have more than a suspicion that an accident was caused by excessive drinking, but, being unable to prove this, they have most scrupulously avoided mentioning drink or the smell of it.

On the other hand, I venture to suggest that it may not be right to say that evidence of the consumption of alcohol is necessarily irrelevant or improperly prejudicial in cases of careless driving. It seems at least arguable that, although a driver may not be deemed incapable of having proper control of his vehicle, he may well have taken enough alcohol to affect his judgment and to render him less careful than he would have been without it. Lack of due care being the essence of the offence, it seems to me that evidence of a possible cause of it in the driver cannot be excluded as irrelevant.

Whether such evidence is likely to be improperly prejudicial is surely a matter for the Bench. It would not, after all, be the sole evidence given in support of the charge, but it may explain why a defendant behaved in a particular way which the prosecution suggest amounts to careless driving. It is for the court to say whether it does or not.

I am far from suggesting that such evidence, however slight, should be universally admitted; but to talk of "stamping out" the practice of calling it seems to show lack of confidence in the ability of courts to use their judgment in deciding its admissibility in particular cases.

J. B. TYRER.

District Registry of the High Court of Justice,
Cambridge.

Losing Ground

Sir,—It is clear that "Chartered Accountant," whose letter under the above heading appeared in your issue of 27th February, and who describes himself as from "a small provincial practice," is, indeed, a little out of touch or he would not have referred to the *Accountant* as the official journal of his own Institute. The *Accountant* is, in fact, owned and published by Gee & Co. (Publishers), Ltd., as an independent weekly professional journal.

As you were good enough to remark editorially, the *Accountants Journal* is published by this Association. I may add that it has been so published for more than fifty years and has a monthly circulation of 20,000 copies. The Association itself is the second largest of the statutorily recognised bodies of accountants in this country.

So far as concerns the original comments appearing in your issue of 23rd January, I will only say that the inferences you drew are entirely unjustified by the article in question, which was, in fact, written by a fairly well-known member of the legal profession.

F. C. OSBOURN,
Secretary,
The Association of Certified and Corporate Accountants.

22 Bedford Square,
London, W.C.1.

POINTS IN PRACTICE

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Ademption of Legacy

Q. *A* by his will dated in 1933 appointed *B* and *C* to be his executors and bequeathed (*inter alia*) "the share I have in the potato business and the motor lorry belonging to *A* and *C* to *C*. The rest of my property and the live and dead farming stock and everything I possess to *B*." At the time the will was made *A* was in partnership with *C* as to the potato business and also farmed on his own account. In 1955 *A* decided to retire. The potato business and *A's* farming business, along with *C's* farming business, were merged as one concern and the firm name of *A and C* was duly registered by *C* as sole proprietor under the Business Names Act, 1916, which was with the full knowledge and agreement of *A*. *A* died in 1958 and from the accounts prepared at date of death a sum of over £700 is due to *A's* estate, being the balance of moneys which he had left in the business. Does the gift of the share in the potato business to *C* fail? If so, presumably *C* must account to the executors on behalf of *B* (the residuary legatee) for the amount shown due to *A's* estate. If not, on what basis should *C's* gift be valued?

A. It would appear that the legacy to *C* has been adeemed. The gift had two parts to it: (i) *A's* share in the potato business; and (ii) *A's* share in the lorry. After *A's* retirement—when, no doubt, a proper deed of dissolution was executed—*A* ceased to have any interest in the potato business, which then became the sole property of *C*. The same reasoning would apply to the lorry if the same was still in existence. It cannot be said that the sum of over £700 left by *A* in the business can be properly referred to as his "share" in the business. It is either a sum which *C* has delayed in paying, or a loan by *A* to *C*. Consequently, the gift in the will is no longer effective. *C* must account to *A's* executors for the sum of over £700 due to *A* at his death.

Rent Act, 1957—Defects of Repair Inadequately Specified

Q. We are acting for the landlord of a controlled dwelling-house on whom the tenant has served a Form G in which the defects of repair are only set out in general and in part unintelligible terms, i.e.: "(1) roof and lead gutter require repairing; (2) bedroom—four windows and stove and floors living and sitting rooms—floors repaired doors should be made to fit; (3) bad sanitation conditions require attention." From these it is impossible to know what exact repairs the landlord is being requested to carry out without a detailed examination of the premises and perhaps further inquiry of the tenant. Schedule I, para. 3, states that the defects must be "specified." Does the general wording used by the tenant comply with the statutory requirements or is the notice wholly or in part invalid?

A. In our opinion the local authority would be entitled to serve a Form J notice on the landlord limited to the "defects" in the roof, gutter and doors, provided that they are satisfied that those defects exist *and* ought reasonably to be remedied, having due regard to the age, character and locality of the dwelling: Sched. I, para. 4 (2) and (5). The specification of the other alleged defects is, we consider, inadequate and does not satisfy the requirement of para. 3. The landlord can, in the meantime, examine roof and lead gutter and doors and remedy any defects which ought to be remedied; or he can await the arrival of a Form J notice and, if it be limited to such defects, give a Form H undertaking: Sched. I, para. 5. If it includes other defects, and is followed by the issue of a certificate of disrepair specifying those other defects, the landlord's remedy is an application to the county court to cancel the certificate as respects those other defects, as being defects which ought not to have been specified: Sched. I, para. 4 (5).

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

Progress of Bills

Read First Time :—

Reading and Berkshire Water, etc., Bill [H.C.] [5th March.

Read Second Time :—

Building (Scotland) Bill [H.C.] [3rd March.
Electricity (Borrowing Powers) Bill [H.C.] [3rd March.
International Bank and Monetary Fund Bill [H.C.] [5th March.

Read Third Time :—

Glamorgan County Council Bill [H.L.] [4th March.
Railway Clearing System Superannuation Fund Bill [H.L.] [3rd March.
Tees Conservancy Bill [H.L.] [3rd March.

In Committee :—

Family Allowances and National Insurance Bill [H.C.] [5th March.
Transport (Borrowing Powers) Bill [H.C.] [3rd March.

HOUSE OF COMMONS

A. Progress of Bills

Read First Time :—

Small Lotteries and Gaming Act, 1956 (Amendment) Bill [H.C.] [4th March.
To amend the law with respect to the holding of small lotteries on licensed premises.

Read Second Time :—

Agricultural Improvement Grants Bill [H.C.] [6th March.
Colonial Development and Welfare Bill [H.C.] [2nd March.

Read Third Time :—

Housing (Underground Rooms) Bill [H.C.] [6th March.
National Assistance (Amendment) Bill [H.C.] [6th March.

In Committee :—

Supreme Court of Judicature (Amendment) Bill [H.C.] [6th March.

B. Questions

Public Inquiries (Reports)

Mr. Bevins said that the decision to publish the reports of inspectors on public inquiries covering disputed planning permission, announced on 27th February, 1958, applied to inquiries held from that date on. He declined to make available to objectors and others concerned reports on public inquiries held before that date, on which the Minister's decisions had been given after that date, since such reports were written as confidential documents. [3rd March.

Noise Nuisances

Mr. H. Brooke said that, when opportunity permitted, legislation would be introduced which would propose, among other things, that excessive, unreasonable or unnecessary noise should be made a statutory nuisance for the purposes of the Public Health Act, 1936. A provision on those lines was already included in many local Acts. [3rd March.

STATUTORY INSTRUMENTS

Barrow-in-Furness Area (Conservation of Water) Order, 1959. (S.I. 1959 No. 321.) 4d.

Clent Hill Common Order, 1959. (S.I. 1959 No. 329.) 5d.

County Court Districts (Ledbury) Order, 1959. (S.I. 1959 No. 315.) 5d.

Educational Conferences (Scotland) Regulations, 1959. (S.I. 1959 No. 334.) 5d.

Family Allowances, National Insurance and Industrial Injuries (European Interim Agreement) Order, 1959. (S.I. 1959 No. 292.) 11d.

Grimsby Cleethorpes and District Water Board (Barnoldby Pumping Station) (Variation) Order, 1959. (S.I. 1959 No. 305.) 5d.

Holyrood Park Regulations, 1959. (S.I. 1959 No. 302.) 5d.

Import Duties (General) (No. 1) Order, 1959. (S.I. 1959 No. 313.) 4d.

Import Duties (Temporary Exemptions) (No. 2) Order, 1959. (S.I. 1959 No. 314.) 4d.

Linlithgow Peel Regulations, 1959. (S.I. 1959 No. 303.) 5d.

Liverpool Pilotage (Amendment) Order, 1958. (S.I. 1959 No. 306.) 5d.

London–Edinburgh–Thurso Trunk Road (Grantham and Great Gonerby By-Pass Link Road) Order, 1959. (S.I. 1959 No. 323.) 4d.

London Traffic (Prescribed Routes) (Ilford) Regulations, 1959. (S.I. 1959 No. 332.) 4d.

Draft **National Insurance** (Earnings) Regulations, 1959. 5d.

National Insurance (European Interim Agreement) Order, 1959. (S.I. 1959 No. 293.) 9d.

Perth County Council (Craigmakerran Springs, Guildtown) Water Order, 1959. (S.I. 1959 No. 333.) 5d.

Public Record Office (Fees) Order, 1959. (S.I. 1959 No. 181.) 4d.

Royal Botanic Garden and Arboretum, Edinburgh, Regulations, 1959. (S.I. 1959 No. 301.) 5d.

Stopping up of Highways (County Borough of Barnsley) (No. 1) Order, 1959. (S.I. 1959 No. 326.) 5d.

Stopping up of Highways (City and County Borough of Bristol) (No. 2) Order, 1959. (S.I. 1959 No. 289.) 5d.

Stopping up of Highways (County of Derby) (No. 3) Order, 1959. (S.I. 1959 No. 327.) 5d.

Stopping up of Highways (County of Gloucester) (No. 4) Order, 1959. (S.I. 1959 No. 324.) 5d.

Stopping up of Highways (County Borough of Ipswich) (No. 1) Order, 1959. (S.I. 1959 No. 307.) 5d.

Stopping up of Highways (County of Kent) (No. 2) Order, 1959. (S.I. 1959 No. 318.) 5d.

Stopping up of Highways (County of Kent) (No. 3) Order, 1959. (S.I. 1959 No. 319.) 5d.

Stopping up of Highways (County of Lincoln, Parts of Kesteven) (No. 2) Order, 1959. (S.I. 1959 No. 317.) 5d.

Stopping up of Highways (City and County Borough of Liverpool) (No. 2) Order, 1959. (S.I. 1959 No. 320.) 5d.

Stopping up of Highways (City and County Borough of Liverpool) (No. 3) Order, 1959. (S.I. 1959 No. 328.) 5d.

Stopping up of Highways (Lincolnshire—Parts of Lindsey) (No. 1) Order, 1950 (Revocation) Order, 1959. (S.I. 1959 No. 308.) 4d.

Stopping up of Highways (County of Norfolk) (No. 1) Order, 1959. (S.I. 1959 No. 309.) 5d.

Stopping up of Highways (County of Nottingham) (No. 3) Order, 1959. (S.I. 1959 No. 310.) 5d.

Stopping up of Highways (County of Salop) (No. 2) Order, 1959. (S.I. 1959 No. 316.) 5d.

Stopping up of Highways (County of Surrey) (No. 4) Order, 1959. (S.I. 1959 No. 325.) 5d.

Wages Regulation (Retail Food) (England and Wales) Order, 1959. (S.I. 1959 No. 288.) 1s. 1d.

Winchester–Preston Trunk Road (Cresswell, North of Stafford, Link Road) Order, 1959. (S.I. 1959 No. 311.) 5d.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

House of Lords

WILL DRAWN BY SOLICITOR: CONTENTS NOT KNOWN OR APPROVED BY TESTATRIX

Wintle *v.* Nye

Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Birkett. 18th December, 1958

Appeal from the Court of Appeal.

The appellant appealed against an order of the Court of Appeal dismissing an appeal from a judgment of Barnard, J., given in favour of the respondent, a solicitor, on the trial of an action with a jury in the Probate, Divorce and Admiralty Division. The appellant claimed revocation of a grant of probate of the will of his cousin, dated 4th August, 1937, and a codicil, dated 13th November, 1939. The testatrix at the date of her death in 1947 was seventy-six years old. The appellant sued as assignee of the interest in the estate of one of the next of kin and claimed that the will and codicil were not duly executed in that the testatrix did not know or approve their contents. His case was that she was a simple old lady of limited understanding, incapable of grasping a long and complex document, the effect of which was that, after payment of various legacies, the bulk of the estate of £115,000 would vest in the respondent, who drafted the will. The respondent denied that she did not know or approve its contents.

Viscount Simonds said that the right of trial by jury was traditionally precious. He hoped that in his consideration of this case he had not failed to pay a jealous regard to the verdict. It was for the respondent to prove affirmatively the knowledge and approval of the testatrix. After her mother's death she and her sister Mildred had lived together. Her property consisted almost entirely of houses in Hove and Brighton. One of these houses she retained for her own use, staying there for two or three weeks at a time. On these visits she was usually accompanied by the appellant's sister Marjorie. On her death, Mildred was her sole next of kin. On Mildred's death soon after, the next of kin were a numerous class consisting of cousins. The respondent and his father had acted professionally for the testatrix and her parents but there was no evidence of intimate friendship. She was unversed in business and did not want to be worried with details of management. On 7th October, 1936, she consulted him about making her will. Her main anxiety was for her sister Mildred—that adequate provision should be made for her and that she should have no more than that. At the first interview the preliminary wishes of the testatrix were stated to be the appointment of the respondent and the Westminster Bank as executors, the giving of annuities of £250 to her cousins Marjorie and Dorothy, the making up of Mildred's income to £650 a year, the giving of legacies of £200 to three local hospitals, the establishment of two pensions at a cost of £600 each for patients at the Streatham Home for Incurables and the giving of certain legacies of unspecified amounts. Nothing was said about residue. The testatrix did not then know the amount of her estate. A draft will was prepared and she required the insertion of eight Brighton hospitals as residuary devisees. On 26th April, 1937, the testatrix, according to the respondent's evidence, instructed him to make certain alterations: (1) to leave him as sole executor; (2) to leave the residue to him instead of to the hospitals; (3) to include a clause providing that she could leave a letter giving him directions as to dealing with the residue in case she thought of somebody afterwards to whom she wanted to leave a legacy. The respondent deposed that the reason given by the testatrix for leaving him the residue was that she did not want to leave Mildred more than £650 a year and that he would be able to provide further funds for her maintenance. He further deposed that when the testatrix said she wished to leave the residue to him he told her that she should consult another solicitor, but she said she did not wish to do so. Under the will, as ultimately executed, the annuities to Marjorie and Dorothy were deleted and they were each given the income of a sum of £1,000. Figures were put before the testatrix which purported to show that the ultimate residue would be £15,000. This was a miscalculation. Before the execution of the will a provision was added that, should the respondent predecease the testatrix, the residue should pass to "his executors, administrators and assigns, to the intent that this gift shall not lapse." Another clause was added by which one-third of the investments set aside to provide the annuity for Mildred should on her death go to three named charities. In 1939, after the outbreak of war, the respondent, according to his evidence, in order to deal with depreciation in the value of the estate, advised the testatrix to revoke the legacies bequeathed to the three charities on Mildred's death. She accepted this advice and drew a codicil which gave effect to it. The obvious result was that all the funds set aside fell into residue. At the trial the judge's summing up was so gravely at fault as to amount to misdirection. It encouraged in the minds of the jury a benevolent and sympathetic consideration of the respondent's evidence and in no way led the jury to a critical approach to what he said or what he would appear to have done. The law was not in doubt and was correctly stated in *Barry* v. *Butlin* (1838), 2 Moo. P.C.C. 480, at p. 482. It was not the law that in no circumstances could a solicitor who prepared a will take a benefit under it. But the fact created a suspicion which must be removed by the person propounding the will. The court must be vigilant and jealous. In the present case the circumstances were such as to impose on the respondent as heavy a burden as could well be imagined. Here was an elderly lady, unversed in business, having no one to rely on except her solicitor. Here was a will made by him under which he took the bulk of her large estate, a will of a complexity which demanded for its comprehension no common understanding. The will was retained by him and no copy was given to her. No independent advice was received by her. The codicil cut out reversionary legacies, allegedly for the benefit of annuitants, but in fact for the benefit of the reversionary beneficiary. All these circumstances demanded a vigilant and jealous scrutiny by the judge in his summing up. The summing up fell short of what the law required and the jury did not get the guidance to which they were entitled. It was not enough for the judge to tell the jury that if they believed the respondent they could decide in his favour. It was imperative that he should point out the considerations for them to bear in mind in deciding whether or not they should believe him. The judge encouraged the jury to treat the will and codicil as standing or falling together. That might have been unobjectionable if he had then gone on to point out how fraught with suspicion was the codicil. He failed to do so. There were circumstances which created the gravest suspicion that the testatrix had little idea of the extent of the benefit she was conferring on the respondent. There were many examples of the uncritical way in which the judge deployed the evidence for the jury's consideration. There was such misdirection that the verdict could not stand. The only issue was whether the testatrix knew and approved the contents of the will and codicil. That was what the respondent was required to prove. The pleadings contained no allegation of fraud and it was said that it was not admissible, under the guise of requiring from him strict proof of knowledge and approval, to make any suggestion from which it could be inferred that, if the testatrix did not know and approve, it was because the respondent was fraudulent. There was no substance in the point. The appellant put the respondent to proof that the testatrix knew and understood the contents of the will. If that could only be established by the respondent's own evidence, he was entitled to challenge his veracity even though the result might be that the jury would not believe him. The case would be remitted to the High Court on the footing that the will was invalid in respect of the beneficial bequests and devises to the respondent and that the codicil was pronounced against. The appellant would be paid all his costs out of the estate. The respondent would have his costs in the High Court out of the estate and would bear his own costs in the Court of Appeal and the House of Lords.

The other noble and learned lords agreed. Appeal allowed.

Appearances: The appellant in person; *Ifor Lloyd*, Q.C., and *Marshall-Reynolds* (*Janson, Cobb, Pearson & Co.*, for *F. H. Nye & Murdoch*, Brighton).

[Reported by F. Cowper, Esq., Barrister-at-Law] **[1 W.L.R. 284**

Court of Appeal

LANDLORD AND TENANT: BUSINESS PREMISES: LANDLORD'S INTENTION TO OCCUPY HOLDING FOR HIS BUSINESS

Nursey and Another *v.* P. Currie (Dartford), Ltd.

Hodson and Willmer, L.JJ., and Wynn Parry, J.

11th February, 1959

Appeal from Dartford County Court.

Premises let on a quarterly tenancy were used by the tenants to store and vulcanise tyres. The landlords, pursuant to s. 25 of the Landlord and Tenant Act, 1954, served notice on the tenants to terminate the tenancy, stating in the notice that they would oppose the grant of a new tenancy on the ground that they intended to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by them therein. At the date of the notice the landlords had been refused planning permission to develop the yard by the erection of a petrol filling station. After service of the notice, but before the hearing of the tenants' application for a new tenancy, such planning permission was granted, and at the hearing it was proved that the landlords intended to demolish the buildings and develop the property as a petrol filling station. It was contended that the landlords were not within the terms of their notice because they did not intend to occupy the holding; but the county court judge, dismissing the tenants' application, held that the proposed demolition of the buildings was immaterial, since the holding comprised the land on which the buildings stood and the landlords intended to occupy the land. The tenants appealed.

WYNN PARRY, J., delivering the first judgment, said that in para. (*g*) of s. 30 (1) of the Act of 1954 there was a reference, as there was in the preceding para. (*f*), to "the holding," and the phrase "the holding" was defined in s. 23 (3) as being "in relation to a tenancy to which this Part of this Act," namely Pt. II, "applies," "the property comprised in the tenancy." In para. (*g*) the words "the holding" must be read as interpreted in the light of that definition, and "the holding" was one which the landlord intended to occupy "for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence." That language circumscribed the use of the phrase "the holding" in that paragraph and made it necessary to concentrate the whole of one's attention on the particular piece of land, whether it had buildings on it or not, which was the subject-matter of the tenancy in question. So viewed, when one looked at the material time at "the holding" under para. (*g*), it was not permissible to take into account the wider scheme which the landlords had in mind, and merely to treat the land comprised in the holding as land which, in one way or another, would be used for the purpose of the wider undertaking. For those reasons this case could only come within para. (*f*), but, unfortunately, there was no right of amendment and the matter had to go forward on the basis of the notice, and in the events which had happened, the landlords did not bring themselves within para. (*g*); and para. (*f*) not having been relied on in the notice which they gave, the appeal should be allowed.

WILLMER, L.J., delivered a concurring judgment.

HODSON, L.J., agreed. Appeal allowed.

APPEARANCES: *Harold Christie*, Q.C., and *G. B. H. Dillon* (*James & Charles Dodd*); *L. K. E. Boreham* (*T. G. Baynes & Son*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[1 W.L.R. 273**

Chancery Division

LANDLORD AND TENANT: BUSINESS PREMISES: DATE OF COMMENCEMENT OF NEW LEASE: BREAK TO REVIEW RENT

***In re* No. 88 High Road, Kilburn**

Wynn Parry, J. 6th February, 1959

Adjourned summons.

Application was made under s. 24 of the Landlord and Tenant Act, 1954, by tenants of business premises for the grant of a new lease. The landlords did not object to the grant of a new lease, but there remained in issue between the parties the amount of rent to be reserved under the new lease, the length of the new term to be granted and the date on which it should commence. The premises were now held on a lease of 36¾ years dated 5th December, 1921, at a present rent of £250 per annum, which expired on 24th June, 1958. The court found that the tenants were entitled to fourteen years' security of tenure and that the rent under the new lease should be £3,000 a year.

WYNN PARRY, J., considering from what date the new lease should begin, said that s. 33 of the Landlord and Tenant Act, 1954, provided that where the court made an order for the grant of a new tenancy it should begin "on the coming to an end of the current tenancy." The "current tenancy" in the present case was, having regard to s. 26 of the Act, the lease granted on 5th December, 1921. The provisions in s. 25 relating to the termination of such a tenancy were in the case of an application to the court governed by s. 64 (1), and accordingly the termination of the current tenancy here was not until the expiration of a period of three months after the termination of all proceedings relating to the application, notwithstanding any injustice which might result to the landlords by the continuation of the rent payable under the old lease. In order to avoid prejudice to the landlords by possible postponement of the date of its commencement, the new lease should not be for a term of fourteen years, but for a term ending on 24th June, 1972, and, as a guard against inflation, it should include a provision that halfway through the term the rent should be reviewed in the light of all circumstances then obtaining, but there would be no corresponding right in the tenants to terminate the lease if on review it was found that a higher rent should be paid.

APPEARANCES: *H. Heathcote-Williams*, Q.C., and *T. G. Field-Fisher* (*Warmingtons & Trevor Jones*); *Sir Lynn Ungoed-Thomas*, Q.C., and *George Avgherinos* (*Judge, Hackman & Judge*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 279**

Queen's Bench Division

CHARTERPARTY: CARGO: DECLARATION OF QUANTITY

Louis Dreyfus & Cie. *v.* Parnaso Cia. Naviera S.A.

Diplock, J. 13th February, 1959

Action.

A charterparty in the "Gencon" form, dated 4th November, 1957, for a single voyage, provided by cl. 1 that the s.s. *Dominator* was to proceed to a named port "and there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk, quantity in owners' option, to be declared by the master in writing on commencement of loading . . ." Clause 2 of the charterparty, by the first paragraph, provided: "Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by improper . . . stowage of the goods . . . or by personal want of due diligence on the part of the owners or their manager . . ." By the second paragraph of cl. 2: "And the owners are responsible for no loss or damage or delay arising from any other cause whatsoever . . ." The third paragraph of the clause in the printed form, which had been deleted, related to damage to goods. On arrival at the port the master of the vessel wrote to the charterers that "the approximative [*sic*] cargo to the holds will be . . . Total 10,400 tons." The charterers brought that quantity of cargo to the port, but in fact the master had overestimated the capacity of the vessel and she loaded 331 long tons short. As a result of the vessel's inability to load the whole of the cargo the charterers incurred expenses which they sought to recover from the shipowners. The shipowners, *inter alia*, denied that the master's declaration had any contractual effect; alternatively they relied on the second paragraph of cl. 2 of the charterparty as exempting them from liability.

DIPLOCK, J., said that, on the construction of cl. 1 of the charterparty, whatever quantity the master declared within the limits in the clause was to be deemed a full and complete cargo for the purposes of the charterparty. The declaration required was of an exact quantity, subject to the *de minimis* rule; the master's notice purported to be given under the clause and, therefore, purported to be of an exact quantity, and accordingly his lordship construed the word "approximative" in the notice as referring to those limits of tolerance which the *de minimis* rule imported into contracts of that kind. He therefore held that the master's notice was a good declaration under the clause. His lordship thought that if there was any ambiguity he could

assist himself in construing the "Gencon" exceptions clause by looking at the paragraph which had been deleted. There was a diversity of authority on the subject but where a standard form of words familiar to commercial men was contained in a printed form in general use it was unreal to suppose that, when the contracting parties struck out a provision dealing with a specific matter, but retained other provisions, they intended to effect any alteration other than the exclusion of the provisions struck out, and *prima facie* no such intention should be ascribed to them. The first paragraph of the clause was expressly limited to loss of or damage to or delay in the delivery of goods. The words "no loss or damage or delay" in the second paragraph were capable of a wide meaning or of a meaning limited to the subject-matter of the first paragraph. There was here an ambiguity and accordingly his lordship would look at the deleted paragraph to see if it threw any light upon it. On doing so, he saw that in the printed form the second paragraph was sandwiched between two paragraphs plainly dealing only with loss of or damage to or delay in the delivery of goods. He was prepared to resolve the ambiguity by holding that the clause was limited to liability for loss of or damage to or delay in delivery of goods, and that it did not cover loss sustained by the charterers owing to the failure of the shipowners to load the contract quantity of goods. That quantity he had held to be the quantity declared by the master and accordingly the charterers succeeded.

APPEARANCES: *R. A. MacCrindle* (*Richards, Butler & Co.*); *Michael Kerr* (*Holman, Fenwick & Willan*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[2 W.L.R. 405**

NOTES AND NEWS

PRACTICE NOTE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

LEGAL AID

REGISTRATION UNDER MAINTENANCE ORDERS ACT, 1958

It is considered that, where an applicant for the registration in a magistrates' court of an order for ancillary relief has a civil aid certificate which covers the obtaining of that order, the application for registration (whether made on or after the making of the order) may be regarded on taxation under the Legal Aid and Advice Act, 1949, as part of the proceedings for obtaining the order and not as proceedings for its enforcement.

B. LONG,
Senior Registrar.

Dated 25th February, 1959.

SOCIETIES

The SHROPSHIRE LAW SOCIETY held its annual dinner at the Raven Hotel, Shrewsbury, on 24th February.

The UNITED LAW DEBATING SOCIETY announces its following meetings to be held in Gray's Inn Common Room during April and May, at 7.15 p.m., unless otherwise stated: Monday, 13th April: Visit of Mr. T. Cedric Jones, former hon. secretary to the Association of Liberal Lawyers. Debate: "This House would welcome a Liberal revival." Monday, 20th April: Debate: "This House believes the contract to marry should be *uberrimæ fidei*." Monday, 27th April: Visit of the Rev. A. Hallidie Smith, Secretary of the Homosexual Law Reform Society. Debate: "This House regrets the continual failure of the Government to implement the Wolfenden proposals concerning homosexual offences." Monday, 4th May: Debate: "This House deplores any scheme whereby control of the offshore islands should be given to Red China." Monday, 11th May: Annual General Meeting. Tuesday, 26th May: Joint Debate with the British Council Debating Society at 3 Hanover Street, London, at 8 p.m. Debate: "This House would welcome the nationalisation of the legal profession."

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